Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 74-1452

HOSPITAL BUILDING COMPANY,
Petitioner,

vs.

TRUSTEES OF THE REX HOSPITAL, a Corporation, JOSEPH BARNES, GEORGE STOCKBRIDGE, and RICHARD URQUHART, JR.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fourth Circuit

JOHN K. TRAIN, III
TIMOTHY S. PERRY
ALSTON, MILLER & GAINES
1200 C&S National Bank Building
Atlanta, Georgia 30303
(404) 588-0300
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fourth Circuit

Hospital Building Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit sitting *en banc* entered in this case (No. 73-1627) on February 18, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, sitting *en banc*, is reported in 1975 Trade Cases ¶ 60,166 (Appendix A hereto). The order of the Court of Appeals granting rehearing *en banc* and withdrawing the previous opinion of the panel is not reported. (Appendix B hereto). The opinion of the panel of

the Court of Appeals affirming *per curiam* the order of the District Court is reported in 1974-1 Trade Cases ¶ 74,903 (Appendix C hereto). The opinion of the District Court (Civil No. 4048) is reported in 1973 Trade Cases ¶ 74,428 (Appendix D hereto).

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). An opinion of a panel of the United States Court of Appeals for the Fourth Circuit in this case was first filed and entered on February 6, 1974 affirming *per curiam* the order of the District Court. Thereafter a petition for rehearing *en banc* was filed February 19, 1974. On June 11, 1974, the petition for rehearing *en banc* was granted, and the opinion of the panel dated February 6, 1974 was withdrawn. The opinion of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, affirming the order of the District Court over the dissent of Judges Winter, Butzner, and Field was entered on February 18, 1975.

QUESTIONS PRESENTED

This case presents the question of the scope of Congressional power exerted under the Sherman Act to prohibit (i) anticompetitive conduct in the provision of hospital services and (ii) monopolization of the provision of hospital services. This question arises in the context of the existence of a nationwide network of financing and providing health care services, a network which has evolved as a result of (i) the involvement of the federal government through Medicare and Medicaid and (ii) the growth of national private health insurance companies such as Blue Cross.

In particular, the questions presented are:

1. Is the impact on interstate commerce of a conspiracy to block the expansion of a hospital so indirect and unsubstantial that the hospital cannot, as a matter of law, state a claim for relief satisfying the "effect on commerce" test of jurisdiction under the Sherman Act where the following facts are alleged:

   (a) The proposed expansion is a virtual tripling of the facility's capacity at a cost of $4,000,000 expected to be financed by one or more loans from out-of-state lenders, and

   (b) The facility in 1972, prior to the proposed expansion, purchased $112,846 of supplies and equipment, 80% of which was paid pursuant to national contracts negotiated by the facility's out-of-state parent corporation, and

   (c) The facility purchased $36,000 of management services in 1972, prior to the proposed expansion, from its out-of-state parent corporation, and

   (d) Approximately 95% of the facility's billings in 1972, prior to the proposed expansion, were made to national insurance companies and to the federal government?

2. Is the provision of hospital services a purely local, intrastate activity, so that a provider of hospital services cannot, as a matter of law, state a claim for relief satisfying the "in commerce" test of jurisdiction under the Sherman Act?

2. Did the District Court err in dismissing a Sherman Act complaint on the pleadings, either for failure to state a claim or for lack of jurisdiction, without allowing any discovery and without the submission of any evidence?

STATUTES INVOLVED

1. The Sherman Act, Section 1 (15 U.S.C. § 1) provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

2. The Sherman Act, Section 2 (15 U.S.C. § 2) provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

3. The Clayton Act, Section 4 (15 U.S.C. § 15) provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

4. The Clayton Act, Section 16 (15 U.S.C. § 26) provides in relevant part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of

> the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danager of irreparable loss or damage is immediate, a preliminary injunction may issue. . . ."

5. 28 U.S.C. § 1337 provides:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

STATEMENT OF THE CASE

A. Basic facts.

This is a civil antitrust action for treble damages of at least $2,400,000 and injunctive relief initiated by the petitioner Hospital Building Company (hereafter "HBC"), a North Carolina corporation. The Complaint alleges violations of Sections 1 and 2 of the Sherman Act. HBC argues that the principal purpose of the alleged conspiracy was to hold the number of hospital beds in the relevant market at an artificially low level thereby restricting the output of hospital services and enabling HBC's two competitors to fix prices, paid in large part through Medicare or by national health insurance companies, at an artificially high level.

As alleged in the Complaint, HBC operates Mary Elizabeth Hospital (hereafter "Mary Elizabeth") a proprietary ("for profit") hospital. As further alleged, the Defendant, Trustees of Rex Hospital, a Corporation, operates Rex Hospital (hereafter "Rex") a private, tax-exempt hospital. Also named as Defendants are three individuals, two of whom are alleged to be administrators or trustees of Rex. For convenience, all the Defendants are referred to as the "Raleigh Group". Also named in the Complaint as co-conspirators but not as defendants are two individuals and Wake County Hospital System, Inc. which is alleged to operate Wake County Memorial Hospital (hereafter "Wake") a government hospital.

The nature of the conspiracy alleged was described by the United States Court of Appeals for the Fourth Circuit in the majority opinion as follows (App. A-3, A-4):

> "HBC alleged below that, beginning at least as early as 1970 and continuing through the present, the Raleigh Group together with others not parties to this suit have

> engaged in a conspiracy aimed at controlling the number of hospital beds, allocating customers (hospital patients), and otherwise exercising unreasonable restraints of and monopolizing the market for medical-surgical hospital services in 'the Raleigh area,' defined as 'the area comprising Wake County, in the State of North Carolina.'
>
> HBC professed to have discovered the conspiracy in late 1971 when it undertook to relocate Mary Elizabeth and expand it from 49 to 140 beds. According to HBC the Raleigh Group and their coconspirators devised a scheme involving bad faith efforts to block authorization of the expansion,[1] tactics to hold up implementation of HBC's plans once authorization was gained, and finally malicious instigation of adverse publicity and general public antipathy.
>
> [1] [Footnote by the Court] At the time HBC sought authorization, North Carolina law required a certificate of need prior to hospital expansion. *See* In Re Certificate of Need for Aston Park Hosp., Inc., 282 N.C. 542, 193 S.E.2d 729 (1973), in which the requirement was held to violate the constitution of North Carolina."*

The Complaint, as amended, alleges:

> "In its operation of Mary Elizabeth Hospital, Hospital Building Company is doing business in interstate commerce. The combination and conspiracy complained of herein has a substantial and direct effect on interstate commerce."

The District Court summarized the specific allegations of the Complaint, as amended, regarding interstate commerce as follows:

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* HBC's claim is that the activities of the Raleigh Group before the state regulatory hearings on the certificate of need are not within the permissible area defined by this Court in *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972), but this issue is not now presented for decision.

"1. Plaintiff is the wholly-owned subsidiary of a Delaware corporation which owns, directly or indirectly, and operates or manages medical-surgical hospitals in five states and Puerto Rico.

2. Plaintiff purchases on a regular and continuing basis substantial amounts of goods, supplies and medicines from vendors in states other than North Carolina.

3. Plaintiff regularly utilizes interstate communications, including the mails, telephone and telegraph to carry on its business.

4. A substantial number of persons regularly come from states other than North Carolina to the Raleigh area for treatment in medical-surgical hospitals.

5. Plaintiff receives a substantial part of its revenue from medicare, medicaid and hospital insurance benefits from insurance companies located outside North Carolina.

6. The planned expansion of plaintiff's present facilities will cost in excess of four million dollars which will be financed through one or more lenders located outside North Carolina.

7. Plaintiff's present hospital is accredited by the Joint Commission on Accreditation of Hospitals, a national organization which promulgates standards for the operation of hospitals." (App. D-2, D-3)

As the Court of Appeals below noted, the Complaint also alleged the purchase by HBC of management services from its parent, Charter Medical Corporation (hereafter "Charter") which is a Delaware corporation with its principal place of business in Macon, Georgia. In 1972, this purchase of management services was alleged to be $36,000. The Court of Appeals below stated as well:

"HBC's parent corporation was incorporated and is located outside of North Carolina, so that the purchase of services can be deemed interstate." (App. A-9)

B. **Proceedings in the District Court.**

Upon motion of the Defendants under Rule 12(b)(1) and (6), and without allowing any discovery, the District Court dismissed the Complaint, as amended, on the pleadings. It is not clear whether the reason for dismissal was failure to state a claim or lack of jurisdiction. The action dismissed was brought under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§15 and 26). Subject matter jurisdiction lay in the District Court under 28 U.S.C. §1337.

The District Court held that the hospital business alleged is "strictly a local, intra-state business" and that despite the petitioner's transactions in interstate commerce, the "conduct of the defendants complained of in this case directly affects only a local activity of the plaintiff, and only incidentally and insubstantially does it affect interstate commerce." (App. D-3, D-4)

C. **Proceedings in the court below.**

Upon appeal by HBC, a panel of the United States Court of Appeals for the Fourth Circuit affirmed the order of District Court *per curiam*. The Federation of American Hospitals, a trade association of approximately 500 investor-owned hospitals across the United States, stating its conviction that "the Court's decision on these issues will ultimately affect all investor-owned hospitals in this country", filed an *amicus curiae* brief in support of HBC's position on appeal.

Upon petition by HBC for rehearing *en banc*, the United States Court of Appeals for the Fourth Circuit granted rehearing *en banc* and withdrew the previous opinion of the panel.

After oral argument, the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, affirmed the order of the District Court over the dissent of Judges Winter, Butzner, and Field.

The majority in the Court of Appeals below, speaking through Judge Craven, held that the District Court dismissed the Complaint on the pleadings for failure to state a claim. The majority did note, however, that the better course would have been to convert the Defendant's motion to one for summary judgment with at least limited discovery, yet did not remand the case with that instruction.

As to the merits, the majority held that the provision of hospital services is, as a matter of law, a "purely local activity." (App. A-5) Accordingly, to state a claim for relief within the jurisdiction of the Sherman Act, HBC would need to allege a conspiracy having a direct and substantial effect on interstate commerce.

The majority then held that the conspiracy alleged did not have a direct and substantial effect on interstate commerce. The majority stated that the intent of the Raleigh Group to direct their conspiracy only at intrastate commerce was relevant in determining the substantiality of the effect on interstate commerce. Further, the majority, in distinguishing *United States v. Employing Plasterers Ass'n.*, 347 U.S. 186 (1954) and *Burke v. Ford*, 389 U.S. 320 (1967), asserted that the Complaint failed sufficiently to allege "anticompetitive power". (App. A-13)

Judge Winter, dissenting in the Court of Appeals below, joined by Judges Butzner and Field, cited this Court's discussion of the breadth of Sherman Act jurisdiction in *Gulf Oil Corporation v. Copp Paving Company, Inc.*, — U.S. —, 43 U.S.L.W. 4059 (December 17, 1974) and argued that the proper test was "whether Congress could reach the alleged conduct under the commerce power." (App. A-16) Though the dissent agreed with the majority that the "in commerce" test of jurisdiction was not met, it argued that the conspiracy alleged did have a substantial and direct effect on interstate commerce.

Unlike the majority, the dissent found the opinion of the United States Court of Appeals for the Third Circuit in *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3rd Cir. 1973) "relevant and persuasive authority for reversing the district court in the instant case", especially with regard to whether a conspiracy allegedly directed solely at the intrastate aspects of a business could directly and substantially affect interstate commerce. (App. A-19)

The dissent focused particularly on the special nature of the federal interest in the health area:

> "There is, furthermore, a clear and significant federal interest in at least one of these connections—the interstate flow of medicare and medicaid payments, and more generally with the costs of medical care in Wake County. Actual or attempted monopolization of the local market could have a dramatic effect, not only to decrease the flow of hospital payments, but to increase the cost of hospital care in the Raleigh area as well. If hospital care costs are increased, insurance costs will also increase, and federal and out-of-state providers will spread these increased costs beyond the local area in which they are incurred. And this is so even if the overall market for hospital care in the Raleigh area is neither increased nor diminished, but only concentrated in the hands of the hospital defendants.
>
> Under all these circumstances, I think it myopic to maintain that the service itself is rendered locally. Local patient care may be the hub of hospital operation, but the spokes—financing, supplies, management, and fee payments—all have out-of-state implications. The hub cannot be braked without affecting the spokes." (App. A-21)

REASONS FOR GRANTING THE WRIT

This case presents the question of the scope of Congressional power exerted under the Sherman Act to prohibit anticompetitive conduct and monopolization of hospital services. The outcome of this case will determine, for all practical purposes, whether hospitals are exempt from the Sherman Act and thus can band together to raise the price of hospital services, including bills paid by the federal government through Medicare and by national health insurance companies, through allocation of the hospital services market in order to restrict output and hold prices at an artificially high level. Finally, it is clear that the Courts of Appeal are in need of an authoritative declaration from this Court affirming the Congressional grant of jurisdiction to the federal courts which is contained in the Sherman Act.

A. The Court of Appeals Below in Holding That the Conspiracy Alleged Does Not Directly and Substantially Affect Interstate Commerce Conflicts With Decisions of This Court and Other Courts of Appeal.

1. The Decision of the Court of Appeals Below Conflicts with Recent Decisions of Two Other Courts of Appeal Involving Alleged Conspiracies to Restrain the Provision of Hospital Services.

Two recent decisions, besides the decision below, have discussed the breadth of the "effect on commerce" test of jurisdiction under the Sherman Act with regard to conspiracies to restrain trade in the provision of hospital services. Both of those decisions conflict with the decision of the Court of Appeals below.

The decision of the Court of Appeals below conflicts with the decision of the United States Court of Appeals for the Third Circuit in *Doctors, Inc. v. Blue Cross of Greater Philadelphia*,

490 F.2d 48 (3rd Cir. 1973). There the Third Circuit reversed a district court order dismissing, for want of jurisdiction, a Sherman Act complaint alleging anticompetitive conduct and monopolization of the provision of hospital services. Applying the "effect on commerce" test of jurisdiction under the Sherman Act, the Third Circuit held there was a substantial effect on interstate commerce because the flow of supplies in interstate commerce to the plaintiff hospital and one hundred similar hospitals in the relevant market could be substantially reduced by the alleged conspiracy.

The Third Circuit considered, and squarely rejected, the precedents relied upon by the District Court in this case. See *Doctors, Inc. v. Blue Cross of Greater Philadelphia, id.*, at 52-53.

In dissenting from the decision of the Court of Appeals below, Judge Winter stated that *Doctors, Inc.* was "relevant and persuasive authority for reversing the district court in the instant case." (App. A-19)

The decision of the Court of Appeals below, however, distinguishes *Doctors, Inc.*, arguing that the effect on interstate commerce in that case was substantial because of the "possible closing of a significant percentage of the hospitals in a metropolitan area." The majority contrasted that case to the instant case where it determined the effect to be insubstantial since it involved only "one small hospital's delayed expansion." (App. A-11)

In determining whether there is jurisdiction in the instant case under the "effect on commerce test," the following factors should be considered. In essence, the Complaint alleges a conspiracy by the only two competitors of HBC in the relevant market. These two competitors are allegedly seeking (i) to carve up for themselves the entire market in hospital service in Wake County and (ii) to allocate between themselves the artificially-restricted output of such services. Such monopolization and restriction of output inevitably affects the flow

of drugs, supplies, and services into the *entire* market, not simply the flow of goods and services to Mary Elizabeth alone.

The majority considered this a small case and unworthy of the federal judiciary's attention because Mary Elizabeth is a "small" (App. A-11) hospital. We respectfully submit that this analysis is misplaced. The effects alleged were not too "small", as measured by prior decisions of this Court. Moreover, it is not just the effects on Mary Elizabeth, but those on the entire market, which should have been measured.

As alleged in the Complaint, the State of North Carolina has determined that there is a shortage of 409 medical-surgical beds in the relevant market. Mary Elizabeth's proposed expansion was from 49 to 140 beds. With a capacity of only 49 beds, Mary Elizabeth purchased in 1972 $112,846 of drugs and supplies, 80% of which was paid pursuant to national contracts negotiated by Charter, HBC's parent corporation. Mary Elizabeth also purchased management services from Charter for $36,000 in that same year (see footnotes 3 and 5 in the opinion of the Court of Appeals below) (App. A-9). The proposed expansion of Mary Elizabeth to 140 beds would thus have substantially increased the flow of drugs, supplies and management services in interstate commerce to Mary Elizabeth. By preventing this expansion, the conspirators not only choked off this increased flow of interstate commerce, but in addition, according to the Complaint, they effectively eliminated the only meaningful competitor—Charter acting through HBC—and turned a three-competitor market into a two-competitor market.*

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* Compare Judge Craven's opinion in Greenville Publishing Company, Inc. v. The Daily Reflector, 496 F.2d 391 (4th Cir. 1974) at 396, holding that the Sherman Act reaches a conspiracy to restrain the business of publishing shopping guides in Greenville, S.C., and stating that "[t]he Supreme Court's approach strongly implies that the Sherman Act protects the market as well as the victim." In Raleigh, N.C., the Act apparently protects neither.

It is clear, therefore, that the Court of Appeals below was incorrect in viewing this case as a one-hospital case in contrast to a one-hundred-hospital case, and should have followed the authority of *Doctors, Inc.* In both this case and *Doctors, Inc.*, the flow of goods and services to the *entire* relevant market is potentially affected by the conspiracies alleged.

In addition to its failure to consider the full range of effects on interstate commerce flowing from the alleged conspiracy, the Court of Appeals below applied a test of substantiality more restrictive than and conflicting in principle with the decision of the United States Court of Appeals for the Fifth Circuit in *St. Bernard General Hospital, Inc. v. Hospital Service Asso. of New Orleans, Inc.*, — F.2d — (No. 74-2186, April 7, 1975), 1975 Trade Cases ¶ 60,256 (Appendix E hereto). There, the Fifth Circuit held that the district court erred in dismissing for lack of jurisdiction a complaint alleging violations of the Sherman Act respecting the rendition of hospital services. The case was remanded to the district court for further proceedings on the question of jurisdiction as well as other questions.

In analyzing the "effect on commerce" test, the Fifth Circuit focused primarily on the effects the alleged conspiracy there could have on the flow of drugs and supplies in interstate commerce. The district court had held as did the district court in this case, "that the rendition of hospital services is a purely local activity" and that " '[w]hat is essentially an intrastate activity is not transformed into interstate commerce by reason of such purchases, and there exists no substantial effect on interstate commerce by the indirect effect of reducing prospective purchases of supplys in interstate commerce.' " The Fifth Circuit rejected this approach—exactly the same taken by the Fourth Circuit majority in this case—saying that "we disagree with the court's purely-local-as-a-matter-of-law premise from which all conclusions, as well as the putative absence of a 'substantial effect' on interstate commerce followed." (App. E-6)

The Fifth Circuit viewed the district court's analysis as an overly narrow reading of *Page v. Work*, 290 F.2d 323 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961), a case which had already been rejected by the Fifth Circuit in *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26 (5th Cir. 1972), *cert. denied* 409 U.S. 1077 (1972). The Fifth Circuit stated that a conspiracy to restrain commerce in the rendition of hospital services could satisfy the "effect on commerce" test if the flow of goods into the state from out-of-state was "reduced or altered" substantially by the conspiracy. (App. E-8)

In contrast, the Court of Appeals below, citing *Page v. Work*, did not look to the substantiality of the effect on the *flow of goods* from out-of-state into the relevant market, but instead required a substantial effect on the *suppliers themselves* or on the *market price* of the goods:

> "Moreover, when the various economic consequences are sorted out and considered in the perspective of their respective markets, it is obvious that none of them could have more than negligible impact: no source of supply or insurance company or lending institution can be expected to go under if Mary Elizabeth doesn't expand, and no market price likely will be affected." (footnotes omitted) (App. A-10)

In applying the "effect on commerce" test, as the Fifth Circuit recognized, it is *not* the effect on the suppliers of goods or on the market price which must be substantial, rather it is the effect on the *flow* of goods and services in interstate commerce.[1]

In determining that these effects on interstate commerce previously discussed were not direct and substantial, the Court

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[1] The Fifth Circuit recognized "that the logic of *Hospital Building Co.* argues for a result contrary to that which we have reached." Nevertheless, the Fifth Circuit did not consider its decision to be in direct conflict with the decision in *Hospital Building Co.* (App. E-10). We submit, however, that the cases cannot be distinguished.

of Appeals below, citing among other cases, *Spears Free Clinic and Hospital v. Cleere*, 197 F.2d 125 (10th Cir. 1952), held that the purported intent of the Raleigh Group to direct their anticompetitive acts solely at a local activity, though not controlling, was relevant to the issue of jurisdiction under the Sherman Act.

In holding the intrastate intent of the conspirators to be relevant under the "effect on commerce" test, the Court of Appeals below conflicts with other Courts of Appeal. The United States Court of Appeals for the Third Circuit in *Doctors, Inc., supra*, upheld a Sherman Act complaint alleging a restraint on hospital services and discussed this question as follows:

> "There is no question about the factual similarity between *Spears* and its progeny, and the present case. If that case were persuasive authority we could undoubtedly rely on it to affirm the dismissal of the complaint in this action. However, the reasoning of *Spears* is defective in two major respects.
>
> First, the opinion even when it was written placed primary reliance on a series of cases that were no longer valid. These cases looked to the intent of the conspiracy alleged in order to determine whether the purported effects on interstate commerce conferred jurisdiction. If the aim of the conspiracy was to obstruct interstate commerce, it was said to have a 'direct' effect and jurisdiction was present. If the goal was otherwise, the effect was termed 'indirect' and there was no jurisdiction. This 'direct-indirect' test had been abandoned by the Supreme Court in the early 1940's. As a result, the reasoning of the opinion rested on flawed grounds even when it was issued in 1952." (at p. 52).

Further, the United States Court of Appeals for the Fifth Circuit in *Lehrman v. Gulf Oil Co.*, 464 F.2d 26, 36 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972), has stated:

> "The interstate nerves of a local business can be deadened swiftly by a conspiracy the object of which happens to be the intrastate aspect of a plaintiff's business . . . It is the effect on commerce that determines federal jurisdiction under the Sherman Act and not any notion of the 'interstate culpability' of those who engage in anticompetitive practices."

As these other Courts of Appeals have held in determining whether a conspiracy with respect to hospital services is actionable under the Sherman Act, the question of the directness and substantiality of an effect on interstate commerce is a matter of *impact*, not a matter of intent.

Thus, the decision of the Court of Appeals below conflicts with decisions of other Courts of Appeal in (i) failing to consider the full range of potential effects on interstate commerce of the conspiracy alleged; (ii) applying a standard of substantiality to the impact on the suppliers or the market price of goods and services instead of the impact on the flow of interstate commerce in the goods and services, and (iii) finding the intrastate intent of the alleged conspirators relevant in determining jurisdiction under the Sherman Act.

2. The Decision of the Court of Appeals Below Conflicts with Decisions of this Court and with Decisions of Other Courts of Appeal.

In *Burke v. Ford*, 389 U.S. 320 (1967) (*per curiam*), and in *United States v. Employing Plasterers Assn'.*, 347 U.S. 186 (1954), this Court has held that conspiracies allegedly directed at a purely intrastate market were actionable under the Sherman Act because there was a sufficient effect on the flow of out-of-state supplys to the local competitors. The decision of the Court of Appeals below conflicts with these two decisions.

In *Doctors, Inc., supra*, p. 53, the United States Court of Appeals for the Third Circuit described the central thrust of these two cases as follows:

> "There is no discussion of 'directness' or of the specific relationship between the interstate goods affected and the local market controlled. Nor is there even a concern with the specific magnitude of the impact on interstate commerce caused by the alleged conspiracy. Instead, the Court in each case ends its inquiry when it has satisfied itself that the logical and therefore probable effect of the alleged act is to reduce the flow of goods in interstate commerce." (footnotes omitted)

The Court of Appeals below attempts to distinguish these two cases by stating that the anticompetitive power alleged in those cases is not alleged in the instant case. As Judge Winter, dissenting in the Court of Appeals below, observed:

> "Similarly, I view the anticompetitive power alleged here as substantial. In essence the plaintiffs allege that a local conspiracy was able to forestall out-of-state entry into the local hospital market. If by means of conspiracy and harassment those who hold a local market can foreclose or limit the entry of competition, capital, and initiative from out-of-state, then it seems to me that the federal interest in interstate commerce is directly involved. To conclude, as the majority does, that the plaintiffs here do not allege the kind of anticompetitive power 'which Congress sought to guard against' is merely to disbelieve the plaintiff's allegations." (App. A-20)

The decision of the Court of Appeals below also conflicts with the decision of the United States Court of Appeals for the Ninth Circuit in *Rasmussen v. American Dairy Association*, 472 F.2d 517 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973). There the Ninth Circuit held that by reason of the

purchase of supplies in interstate commerce, the local company's operations sufficiently involved interstate commerce to warrant jurisdiction under the Sherman Act. No mention was made of the dollar volume of these interstate purchases of supplies.

The decision in the Court of Appeals below also conflicts with the decision of the United States Court of Appeals for the Seventh Circuit in *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Ass'n.*, 484 F.2d 751 (7th Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974) where the court, citing *Rasmussen*, adopted a broad view of jurisdiction under the Sherman Act in sharp contrast to the view adopted by the Court of Appeals below.

3. In Determining the Substantiality of the Restraints Upon Commerce of the Conspiracy, the Decision of the Court of Appeals Below Fails to Give Adequate Weight to the Involvement of the Federal Government in the Financing and Regulation of Hospital Services and Presents an Important Question in the Application of the Sherman Act.

In *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256 (7th Cir. 1975), petition for cert. filed *sub nom* Modern Asphalt Paving and Construction Co. (March 21, 1975), the Seventh Circuit held that the financing of a sewer project in part by the United States Department of Housing and Urban Development was a significant factor in finding jurisdiction under the Sherman Act:

> ". . . [F]unds for the project came from HUD and its appropriation to the city had to be increased after the bid, higher than the engineer's estimate, was received. HUD funds are transferred in interstate commerce. An increase in the amount of money required for this project would inevitably mean that there would be less money available for HUD projects elsewhere in the United States."

In the instant case, HBC has alleged that over a third of the billings by Mary Elizabeth in 1972 were made to the federal government under Medicare. The conspiracy to restrict output of hospital services, thereby raising the price of such services, has a direct impact on the flow of federal resources under this health care program, not just to HBC but to all hospitals in the relevant market.[2]

As argued by Judge Winter, dissenting in the Court of Appeals below:

> "There is, furthermore, a clear and significant federal interest in at least one of these connections—the interstate flow of medicare and medicaid payments, and more generally with the costs of medical care in Wake County. Actual or attempted monopolization of the local market could have a dramatic effect, not only to decrease the flow of hospital payments, but to increase the cost of hospital care in the Raleigh area as well. If hospital care costs are increased, insurance costs will also increase, and federal and out-of-state providers will spread these increased costs beyond the local area in which they are incurred. And this is so even if the overall market for hospital care in the Raleigh area is neither increased nor diminished, but only concentrated in the hands of the hospital defendants." (App. A-21)

The intimate involvement of the federal government in the providing of hospital services is further highlighted by the fact that the *very expansion* the Raleigh Group is allegedly conspiring to prevent is subject to review under regulations issued by the Secretary of Health, Education, and Welfare pursuant to federal statute. A provider of hospital services, such as HBC, receives payment from the federal government under Medicare

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[2] The federal government spent $8,363,000,000, including administrative costs, in 1972 as its outlay under Medicine. Table No. 435, Federal Outlays for Selected Public Welfare Programs: 1972-1974, Statistical Abstract of the United States, 1974, U.S. Department of Commerce.

based upon a formula generally designed to measure the reasonable cost of hospital services.[3] One element in the formula takes into account the cost of capital expenditures such as those contemplated in the $4,000,000 expansion of Mary Elizabeth.[4] Unless the capital expenditure has been approved through a procedure set up under federal statute to prevent wasteful duplication of facilities, however, the provider will receive no payment under Medicare for that portion of its costs.[5] In addition to this form of regulation, Mary Elizabeth is also subject to regulation by the N.L.R.B. under the National Labor Relations Act.[6]

Clearly, the federal government has a vital interest in the provision of hospital services, in part because of its major role as an ultimate purchaser of these services. This role is at least as persuasive here with regard to jurisdiction under the Sherman Act as the role played by HUD in the financing of sewer projects.

In *Gulf Oil Corporation v. Copp Paving Company, Inc.*, — U.S. —, 43 U.S.L.W. 4059 (December 17, 1974) this Court reiterated its previous statements regarding the scope of Congressional power exerted under the Sherman Act:

> "Moreover, our cases have recognized that in enacting § 1 Congress 'wanted to go to the utmost extent of its constitutional power in restraining trust and monopoly agreements . . .' *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 558 (1944)."

The decision of the Court of Appeals below adopts too restrictive a view of the power of Congress to prohibit anti-competitive conduct and monopolization of a market which the federal government already pervasively regulates and finances.

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[3] 42 U.S.C. § 1395 *et seq.*

[4] 42 U.S.C. § 1395(v)(1).

[5] 42 U.S.C. § 1320(a)-1.

[6] 29 U.S.C. § 151 *et seq.*

The importance of determining the scope of Congressional power exerted under the Sherman Act with regard to performing services in contrast to the manufacture and sale of goods has been recognized by this Court in granting a writ of certiorari to the United States Court of Appeals for the Fourth Circuit in the case of *Goldfarb v. Virginia State Bar, et al.*, 497 F.2d 1 (4th Cir. 1974), *cert. granted*, 419 U.S. 963 (1974), Dkt. No. 74-70.

B. The Court of Appeals Below, in Holding That the Provision of Hospital Services Is, as a Matter of Law, a Purely Local, Intrastate Activity, Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled by This Court.

The Court of Appeals below held:

> "The provision of hospital services has consistently been held to be a purely local activity. *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167, 170 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Spears Free Clinic v. Cleere*, 197 F.2d 125, 126 (10th Cir. 1952)." (App. A-5)

In so holding, the Court of Appeals below relied on two decisions in which the only allegation considered by either court supporting jurisdiction related to an unspecified number of out-of-state patients which used or might use the hospital in question. The meager allegations regarding jurisdiction considered by the Courts of Appeal in both *Elizabeth* and *Spears* severely restrict their applicability here where HBC alleged numerous other facts showing its place in the flow of interstate commerce. In addition, the Court of Appeals below failed to consider that both *Elizabeth* and *Spears* were decided before the advent of federal financing and regulation of hospital services under Medicare and Medicaid and the expansion of national private health insurance companies.

This question must be viewed in the light of the position of this Court, reiterated in *Gulf Oil Corporation v. Copp Paving Company, Inc., supra,* that Congress, in enacting the Sherman Act, went "to the utmost extent of its constitutional power in restraining trust and monopoly agreements."

The concept of interstate commerce is not static but adjusts to the reality of the market place. *Swift and Co. v. United States,* 196 U.S. 375 (1905). In economic reality, the ultimate purchasers of hospital services today, as clearly shown in this case, are (i) national private health insurance companies and (ii) the federal government under its Medicare and Medicaid programs. The days when an individual receives from and pays the provider for hospital services out of his own pocket are over. The flow of interstate commerce begins with the purchase of the goods and services necessary to provide hospital services and continues through the payment of these services by such ultimate purchasers.

In *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944), this Court faced a similar issue. The business of insurance had not been viewed previously as "commerce". This Court, in a landmark decision, acknowledged the vital importance of insurance to each citizen and the growth of a nation-wide network in insurance which had developed as a practical economic matter over the years. This Court held the business of insurance to be "commerce" within the meaning of the Sherman Act and subject to jurisdiction under the Sherman Act because it was in the flow of interstate commerce.

In explaining this decision, this Court stated:

> "Premiums collected from policyholders in every part of the United States flow into these companies for investment. As policies become payable, checks and drafts flow back to the many states where the policyholders reside. The result is a continuous and indivisible stream of intercourse among

> the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts. Individual policyholders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office—the risks it insures, the premiums it charges, the investments it makes, the losses it pays—concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state" (pp. 541-542).

It is precisely this inter-relationship between the cost of hospital services rendered in local markets such as Wake County and both (i) the premiums paid by all policy-holders of national private health insurance companies and (ii) the expenditures of the federal government under Medicare and Medicaid to which Judge Winter, dissenting in the Court of Appeals below, referred as follows:

> "If hospital care costs are increased, insurance costs will also increase, and federal and out-of-state providers will spread these increased costs beyond the local area in which they are incurred." (App. A-21)

As this Court decided with the insurance business, no exception from the coverage of the Sherman Act should be made for the hospital business.

Instead of following *Spears* and *Elizabeth,* the Court of Appeals below should instead have adopted the view of the "in commerce" test stated by the United States Court of Appeals for the Ninth Circuit in *Rasmussen v. American Dairy*

Association, 472 F. 2d 517 (9th Cir. 1972), *cert. denied* 412 U.S. 950 (1973):

> ". . . the power of Congress over commerce among the states is not a 'technical legal conception,' divorced from economic reality. *See* United States v. South-Eastern Underwriters Ass'n, *supra*, 322 U.S. at 547, 64 S.Ct. at 1170. . . . As Justice Cardozo noted in his dissent in Carter v. Carter Coal Co., 298 U.S. 238, 328, 56 S.Ct. 855, 880, 80 L.Ed. 1160 (1936), the words and phrases used to define the commerce power must be interpreted 'with suppleness of adaptation and flexibility of meaning. The power is as broad as the need that evokes it.' Whether the requisite 'substantial economic effect' or 'substantial relation to the national interest' is present or absent is a practical, case-by-case economic judgment, not a conclusion derived from application of abstract or mechanistic formulae. Mandeville Island Farms v. American Crystal Sugar Co., *supra*, 334 U.S. at 232-233, 68 S.Ct. 996; United States v. South-Eastern Underwriters' Ass'n, *supra*, 322 U.S. at 546-547, 64 S. Ct. 1162; Wickard v. Filburn, *supra*, 317 U.S. at 119-125, 63 S.Ct. 82." (footnotes omitted) (at p. 523).

The decision of the Court of Appeals below in holding the provision of hospital services to be purely local, intrastate commerce is inconsistent with the decisions of this Court and with the approach articulated in *Rasmussen*.

In addition, as this case makes clear, it will be difficult for hospitals seeking to enter or expand within a market other than a major metropolitan area to meet the jurisdictional requirements under the "effect on commerce" test. Consequently, the federal government as the ultimate purchaser of a vast amount of these services will be virtually unprotected by the Sherman Act from conspiracies to foreclose entry and

to monopolize. It is important that this Court limit *Elizabeth* and *Spears* to their own economic era and their own facts in order to adjust the concept of interstate commerce to meet the new circumstances in the market for hospital services as presented in this case.

C. The Court of Appeals Below in Affirming Dismissal of a Sherman Act Complaint for Failure to State a Claim Sanctions a Departure From the Usual and Accepted Course of Judicial Proceedings Which Should Be Corrected by This Court.

The decision of the Court of Appeals below seriously weakens the effectiveness of the private action pursuant to Section 4 of the Clayton Act as a means of enforcing the antitrust policy of the United States. This Court has frequently recognized the vital role played by such private actions. *Perma-Life Mufflers v. International Parts Corp.*, 392 U.S. 134 (1968); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947).

Without allowing any discovery and without the submission of any evidence, the District Court below dismissed HBC's complaint, as determined by the Court of Appeals below, for failure to state a claim on which relief can be granted.

The law on this point is well summarized in *Chapiewsky v. G. Heileman Brewing Company*, 297 F.Supp. 33, 38 (W.D. Wisc. 1968):

> "Summary dismissal in private antitrust actions should be sparingly granted because of the nature of the issues involved and because it may be difficult to plead more precisely the effects on interstate commerce until discovery has been had. See Poller v. Columbia Broadcasting Sys-

tem, Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L.Ed. 2d 458 (1962); Radovich v. National Football League, 352 U.S. 445, 454, 77 S. Ct. 390, 1 L.Ed. 2d 456 (1957); Clausen & Sons, Inc. v. Theo. Hamm Brewing Co., 284 F. Supp. 148, 154-155 (D. Minn. 1967); Donlan v. Carvel, 209 F. Supp. 829, 831 (D. Md. 1962)."

See: *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Assn., supra; Donlan v. Carvel*, 209 F. Supp. 829, 831 (D. Md. 1962).

As observed by the Fifth Circuit in *St. Bernard, supra*, the Court of Appeals below "announced its decision not without considerable trepedation, terming it 'a rare exception to prove the rule that judgments on the pleadings in antitrust cases will ordinarily be reversed'." (App. E-10).

In announcing its decision, the Court of Appeals below further stated:

> "Our task would be much simpler had the district court converted the motion to one for summary judgment as authorized by the last sentence of Rule 12(b). Such a course would doubtless have involved the district court and counsel in limited discovery procedures, but we think the extreme time and effort would have been worthwhile." (App. A-3).

Nevertheless, the Court of Appeals below did not reverse the district court and remand for limited discovery. In contrast, the district court in *St. Bernard, supra*, had required the "submission of affidavits and depositions in the nature of summary judgment proof", but, even so, the Fifth Circuit remanded the case for additional proceedings.

The departure of the District Court below, sanctioned by the Court of Appeals' majority opinion below is unwarranted, has a substantial adverse impact on the effectiveness of the private antitrust action in enforcing the antitrust policy of the United States, and is in conflict with governing decisions of this Court.

CONCLUSION

The decision of the Court of Appeals below is in conflict with decisions of other Courts of Appeal. It fails to follow decisions of this Court. It raises an important question of federal law which should be decided by this Court with regard to the position of providers of hospital services in the flow of interstate commerce. In sanctioning a departure from the usual course of judicial proceedings, it threatens the effectiveness of private actions in enforcing the antitrust policies of the United States.

The petition for certiorari should be granted.

Dated: May 16, 1975.

Respectfully submitted

JOHN K. TRAIN, III

TIMOTHY S. PERRY
ALSTON, MILLER & GAINES
1200 C&S National Bank Building
Atlanta, Georgia 30303
Counsel for Petitioner

APPENDICES

APPENDIX A

Opinion

(Filed February 18, 1975)

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 73-1627

Hospital Building Company,
Appellant,

Federation of American Hospitals,
Amicus Curiae,

versus

Trustees of The Rex Hospital, a Corporation; Joseph Barnes; George Stockbridge; Richard Urquhart, Jr.,
Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F. T. Dupree, Jr., District Judge.

(Argued October 3, 1974 Decided February 18, 1975)

Before HAYNSWORTH, Chief Judge, BRYAN, Senior Circuit Judge, and WINTER, CRAVEN, BUTZNER, RUSSELL, FIELD, and WIDENER, Circuit Judges, sitting en banc.

John K. Train, III, and Timothy S. Perry (Jordan, Morris and Hoke and Alston, Miller and Gaines and John R. Jordan, Jr., on brief) for Appellant; (Carl Weissburg, Lawrence E. Mindell and

Weissburg, Jacobs and Gerst on brief for Amicus Curiae Federation of American Hospitals); Ray S. Bolze and John H. Anderson (Thomas W. Steed, Jr.; John R. Fornaciari; Allen, Steed and Pullen; Smith, Anderson, Blount and Mitchell; Howrey, Simon, Baker, and Murchison; Lillard H. Mount; Richard M. Hutson, II; and Hofler, Mount, White and Long on brief) for Appellee.
CRAVEN, Circuit Judge:

In this action filed pursuant to sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, appellant Hospital Building Corporation (HBC) sought treble damages in excess of $2 million and injunctive relief for alleged violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The sole question before us is whether the district court erred when it dismissed HBC's amended complaint on the ground that it failed to allege a sufficient nexus with interstate commerce to invoke the Sherman Act.

I

The motion to dismiss was lodged under Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. Whether termed "lack of jurisdiction over the subject matter" or "failure to state a claim upon which relief can be granted," the result of such a motion, if granted, is the same. Dismissal under Rule 12, the lineal descendant of demurrer, is, of course, merely a decision on the pleadings. For that reason, such motions "are granted sparingly and with caution." 5 Wright & Miller, Federal Practice and Procedure, § 1349, at 541. Especially is this so in antitrust cases "because it may be difficult to plead more precisely the effects on interstate commerce until discovery has been had." *Chapiewsky v. G. Heileman Brewing Co.*, 297 F. Supp. 33, 38 (W.D. Wis. 1968). Generally, we think that where a question of fact arises as to the substantiality of the impact of a local restraint on interstate commerce, the question should not be decided on a motion to dismiss. *Donlan v. Carvel*, 209 F. Supp.

829, 831 (D. Md. 1962). Our task would be much simpler had the district court converted the motion to one for summary judgment as authorized by the last sentence of Rule 12(b). Such a course would doubtless have involved the district court and counsel in limited discovery procedures, but we think the extra time and effort would have been worthwhile.

Whether the complaint was dismissed for lack of subject matter jurisdiction *or* failure to state a claim upon which relief could be granted is not clear. Since Congress specifically has conferred jurisdiction of Sherman Act claims (15 U.S.C. §§ 15 and 26), we think it the better analysis to treat an insufficient plea of effect upon interstate commerce as a failure to state a claim upon which relief can be granted rather than lack of jurisdiction (in the sense of power) over the subject matter. So viewed, our distaste for judgment on the pleadings is even greater, for a motion to dismiss for failure to state a claim "is viewed with disfavor and [should be] rarely granted." 5 Wright & Miller, *supra*, § 1357 at 598.

Nevertheless, we have concluded to affirm. That we do so should be taken by the bar and the district judges as a rare exception to prove the rule that judgments of dismissal on the pleadings in antitrust cases will ordinarily be reversed.

II

HBC operates in Raleigh, North Carolina, a 49-bed proprietary hospital, Mary Elizabeth Hospital, which offers general medical-surgical hospital services to the public. The appellee, referred to by HBC in its brief and hereinafter by us as "the Raleigh Group," are a North Carolina corporation that runs a hospital in competition with Mary Elizabeth in Raleigh and various individuals involved in the provision of medical-surgical hospital services in Raleigh. HBC alleged below that, beginning

at least as early as 1970 and continuing through the present, the Raleigh Group together with others not parties to this suit have engaged in a conspiracy aimed at controlling the number of hospital beds, allocating customers (hospital patients), and otherwise exercising unreasonable restraints of and monopolizing the market for medical-surgical hospital services in "the Raleigh area," defined as "the area comprising Wake County, in the State of North Carolina."

HBC professed to have discovered the conspiracy in late 1971 when it undertook to relocate Mary Elizabeth and expand it from 49 to 140 beds. According to HBC the Raleigh Group and their coconspirators devised a scheme involving bad faith efforts to block authorization of the expansion,[1] tactics to hold up implementation of HBC's plans once authorization was gained, and finally malicious instigation of adverse publicity and general public antipathy. HBC alleged that the scheme has delayed expansion of Mary Elizabeth, and asked as damages treble the amount of direct costs and loss of revenue attributable to the delay. HBC also sought injunctive relief against a continuation of the alleged conspiracy. Because we conclude that the district court was correct in finding that even if HBC proved all of its factual allegations it still would have shown an insufficient connection with interstate commerce to invoke the Sherman Act, we affirm.

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[1] At the time HBC sought authorization, North Carolina law required a certificate of need prior to hospital expansion. *See* In Re Certificate of Need for Astron Park Hosp., Inc., 282 N.C. 542, 193 S.E.2d 729 (1973), in which the requirement was held to violate the constitution of North Carolina.

III

An antitrust plaintiff may establish the necessary connection with interstate commerce in either of two ways: by demonstrating that the alleged anticompetitive conduct occurred *in* interstate commerce, or by showing that the conduct, though wholly intrastate, had a substantial *effect on* interstate commerce.

Greenville Publishing Co. v. The Daily Reflector, Inc., 496 F.2d 391, 395 (4th Cir. 1974) (emphasis added). *See also Goldfarb v. Virginia State Bar*, 497 F.2d 1, 16 (4th Cir.), *cert. granted*, 43 U.S.L.W. 3246 (U.S. Oct. 29, 1974) (No. 74-70); *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341, 343 (9th Cir. 1969); *Lieberthal v. North Country Lanes, Inc.*, 332 F.2d 269, 271-72 (2d Cir. 1964). Within this traditional analytic framework the question for decision is whether the conspiracy described in HBC's complaint has either directly restrained *or* substantially affected interstate commerce.

IV

There is little basis for HBC's assertion that the alleged conspiracy acts directly in interstate commerce. The Raleigh Group is concerned exclusively with restraining Mary Elizabeth's provision of hospital services and with controlling the market for such services in the Raleigh area. The provision of hospital services has consistently been held to be a purely local activity. *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167, 170 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Spears Free Clinic v. Cleere*, 197 F.2d 125, 126 (10th Cir. 1952). Therefore, anticompetitive conduct aimed at the provision of such services necessarily acts *directly* only upon *intrastate* commerce. *See United States v. Oregon State Medical Society*, 343 U.S. 326, 338-39 (1952); *Elizabeth Hospital, Inc. v. Richardson, supra; Riggall v. Washington County Medical Society*, 249 F.2d 266,

268 (8th Cir. 1957); *cert. denied*, 355 U.S. 954 (1958); *Spears Free Clinic v. Cleere, supra.*

HBC's argument that the Raleigh Group's anticompetitive conduct occurred "in commerce" amounts to this: (1) Mary Elizabeth, and hospitals in general, have become substantially enmeshed in the interstate commerce network through their use of interstate communications facilities, their subjection to extensive federal regulation, their purchases of materials and services from out-of-state, their treatment of patients from other states, and their financial arrangements with national health insurers and government welfare programs; (2) the conspiracy directly affected Mary Elizabeth; therefore, the conspiracy, by acting upon a hospital so entwined in interstate commerce, acted directly upon interstate commerce. We accept the premises of the syllogism but reject the conclusion.

It is settled that the "in commerce" test is not whether the conduct complained of is aimed at a business engaged in interstate commerce, but whether the conduct complained of acts directly upon the interstate aspects of such a business. *United States v. Yellow Cab Co.*, 332 U.S. 218, 230-34 (1947); *Sun Valley Disposal Co. v. Silver State Disposal Co., supra*, 420 F.2d at 343; *Lieberthal v. North Country Lanes, Inc., supra*, 332 F.2d at 271; *Savon Gas Stations Number Six, Inc. v. Shell Oil Co.*, 309 F.2d 306, 308-09 (4th Cir. 1962), *cert. denied*, 372 U.S. 911 (1963); *Page v. Work*, 290 F.2d 323, 330 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961). Here, no matter how entwined in our increasingly national economy Mary Elizabeth and other Raleigh area hospitals may be, the fact remains that the conspiracy complained of directly affected only one aspect of those hospitals' businesses, namely the provision of surgical-medical hospital services in the Raleigh area. And the provision of such services remains what it always has been: a local, intrastate activity, not interstate commerce.

In its argument that "in commerce" jurisdiction exists HBC relies heavily on language from *Rasmussen v. American Dairy Association*, 472 F.2d 517 (9th Cir.), *cert. denied*, 412 U.S. 950 (1973). We cannot see the relevance of that case to our situation for purposes of the "in commerce" test. The court in *Rasmussen* indicated, although it did not decide conclusively, 472 F 2d at 524-25, that the "in commerce" test was met by a restraint on the intrastate sale of a filled-milk product called "Go" which was manufactured instate from ingredients all but one of which originated out of state. The court was able to suggest that the restraint acted directly upon the flow of commerce formed by "Go" and its ingredients because—as the court said—"for all practical purposes, the out-of-state ingredients *are* 'Go.' " *Id.* at 525 (original emphasis). *Cf. Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). Here, in contrast, there is no out-of-state product that is passed to patients in an economic transaction as a dominant ingredient of hospital services in the Raleigh area. Probably the only out-of-state products sold by Mary Elizabeth are drugs, and they are sold not so much as part of the interstate trade in drugs, but rather as a small and inseparable component of the *service* provided by Mary Elizabeth. This case is therefore different from *Northern California Pharmaceutical Ass'n v. United States*, 306 F.2d 379, 386-87 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962), where the court found sales of drugs by pharmacies part of the interstate commerce flow of drugs: there, the drugs in their flow from manufacturer to ultimate consumer never lost their character as both a *product* and a distinct line of commerce.

V

It is not so easy to decide the result under the second, or "affecting commerce," branch of the analysis. Here the fact that the Raleigh Group's conduct acted directly only upon a local market and a local aspect of Mary Elizabeth's business is

not dispositive. The question remains whether that conduct, though local in its immediate motive and effect, nevertheless so substantially[2] affects interstate commerce as to invoke the Sherman Act. That can only be a matter of degree, and such matters are never clean:

> There is no bright line dividing cases in which the effect upon interstate commerce is sufficient to permit Congress to prohibit particular anticompetitive activity under the commerce clause from those cases in which it is not sufficient. In this area perhaps more than in most, each case must turn on its own facts.

Rasmussen v. American Dairy Association, supra, 472 F.2d at 526.

HBC suggests several ways in which interstate commerce has been affected by the Raleigh Group's thwarting of the Mary

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[2] The volume, amount, or quantity of interstate commerce involved is irrelevant under the "in commerce" test, but may be crucial under the "affecting commerce" test. *See* Greenville Publishing Co. v. The Daily Reflector, Inc., 496 F.2d 391 n.6, 395 (4th Cir. 1974); Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 526-28 (9th Cir.), *cert. denied,* 412 U.S. 950 (1973); Las Vegas Plumbers Merchant Ass'n v. United States, 210 F.2d 732, 739-40 n.3 (9th Cir.), *cert. denied,* 348 U.S. 817 (1954); United States v. Richter Concrete Corp., 328 F. Supp. 1061, 1065-66 (S.D. Ohio 1971). As in other contexts, *see, e.g.,* United States v. LeFaivre, No. 74-1239 (4th Cir. Dec. 4, 1974), the Congress utilized its recognized power over commerce to reach detrimental activity. "The addition of the words 'or commerce among the several states' was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes . . ." Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940). Thus if anticompetitive conduct occurs *in* commerce, to whatever degree, the Sherman Act is triggered. But if anticompetitive conduct occurs wholly *intra*state, Congress has left to the courts to decide whether such conduct "is sufficiently related to interstate commerce to justify the prohibition of that conduct as 'necessary and proper' to the protection of interstate commerce against the presumed economic burdens resulting from the anti-competitive practices." Rasmussen v. American Dairy Ass'n, *supra,* at 524.

Elizabeth expansion. Neither the hospital's interstate purchases of supplies and equipment,[3] its billings to national insurance companies and the federal government,[4] nor its purchases of management services from its parent corporation[5] have increased as they would were the hospital to expand. And the $4 million cost of expansion was to be financed by non-North Carolina lenders, so that substantial interest payments would flow across state lines.

Aware that such decisions should be exercises of reasoned economic judgment rather than applications of mechanistic formulae, *see Rasmussen v. American Dairy Association, supra,* 472 F.2d at 523, we conclude that the various ramifications noted by HBC do not add up to a sufficiently substantial effect upon interstate commerce to satisfy Sherman Act requirements. The effect here seems to us the indirect and fortuitous consequence of the restraint of the intrastate Raleigh area hospital market, rather than the result of activity purposely directed toward interstate commerce.[6] Although not controlling, this fac-

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[3] Mary Elizabeth's purchases totalled $112,846 in 1972, 80 percent of which sum was paid pursuant to national contracts negotiated by HBC's parent corporation.

[4] Such billings represented approximately 95 percent of Mary Elizabeth's total billings in 1972.

[5] $36,000 in 1972. HBC's parent corporation was incorporated and is located outside of North Carolina, so that the purchase of services can be deemed interstate.

[6] An example of anticompetitive conduct that is aimed at a local market and yet directly and purposefully affects interstate commerce is that in United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945). Liquor dealers in Colorado conspired to fix retail liquor prices within the state, a purely local aim. But as a means of accomplishing their purpose they agreed both to compel out-of-state liquor producers to enter into fair trade contracts and to boycott those producers who failed to do so. The Supreme Court in finding Sherman Act jurisdiction focused upon this tactic of the conspirators, stating that "[w]hatever was the ultimate object of this conspiracy, the means adopted for its accomplishment reached beyond the boundaries of Colorado." 324 U.S. at 298.

tor is relevant to the issue of substantiality. *See, e.g., Spears Free Clinic v. Cleere, supra,* 197 F.2d at 127; *Marstion v. Ann Arbor Property Managers (Management) Association,* 302 F. Supp. 1276, 1280 (E.D. Mich. 1969), *aff'd per curiam,* 422 F.2d 836 (6th Cir.), *cert. denied,* 399 U.S. 929 (1970). Moreover, when the various economic consequences are sorted out and considered in the perspective of their respective markets,[7] it is obvious that none of them could have more than negligible impact: no source of supply or insurance company or lending institution can be expected to go under if Mary Elizabeth doesn't expand, and no market price likely will be affected. In short, we are unconvinced that the alleged conspiracy, even if successful, can affect interstate commerce in the detrimental manner that concerned Congress when it passed the Sherman Act. *Cf. Page v. Work, supra,* 290 F.2d at 332-33.

In deciding that there is here insufficient impact on interstate commerce to invoke the Sherman Act we do not overlook *Doctors, Inc. v. Blue Cross of Greater Philadelphia,* 490 F.2d 48 (3d Cir. 1973). The Third Circuit in that case found jurisdiction over an alleged conspiracy of Blue Cross and a hospital planning agency aimed at manipulating the Greater Philadelphia hospital services market to Blue Cross's benefit. The court based its finding on the fact that the conspiracy, if successful, could shut down many of the approximately 100 hospitals in the Greater Philadelphia area, which could affect as much as $23 million per year in interstate shipments of supplies. According to the court, and we agree, this potential effect upon the traffic in out-of-state goods was "substantial enough" to invoke the Sherman Act. 490 F.2d at 53.

We think *Doctors, Inc.* is distinguishable. There is simply no significant comparison between the effect on commerce of

[7] *Cf.* Rasmussen v. American Dairy Association, 472 F.2d 517, 527 (9th Cir.), *cert. denied,* 412 U.S. 950 (1973); "The basic issue . . . is the extent to which a prohibition of the defendants' specific conduct is justifiable as a means of protecting *the specific line of interstate commerce involved.*" (emphasis added).

one small hospital's delayed expansion, especially when other hospitals contemplate expansion, and the vastly greater effect of the possible closing of a significant percentage of the hospitals in a metropolitan area. The *Doctors, Inc.* court carefully distinguished its situation from *Lieberthal v. North Country Lanes, Inc., supra,* and *Page v. Work, supra,* referring to them as "good law" and "the kinds of cases which remain beyond the reach of interstate commerce jurisdiction." 490 F.2d at 54. We agree and conclude that this case resembles *Lieberthal* and *Page* more than *Doctors, Inc.*[8]

Having quite plausibly, we think, fit this case into its appropriate pigeonhole entitled "nonsubstantial or de minimis effect on interstate commerce," we are left with a feeling of dissatisfaction. Labeling one case "de minimis" and another as "affecting commerce" does achieve a result but is not otherwise very revealing. Anyone who studies decisions applying the "affecting commerce" test will be struck by the absence of a clear line, much less a bright one, between those effects that are deemed substantial and those that are characterized as "indirect," or "fortuitous," or "insubstantial," or "de minimis," or "sporadic," or "incidental." In any area so very gray it is absurd to suppose that we or any other court can precisely count up the tons of plaster, bottles of liquor, or quantity of proprietary drugs sufficient to cross the line of substantiality. Increasingly, intrastate economic conduct affects interstate commerce due to the interdependence of all segments of our national economy. Whether or not "de mini-

[8] In *Lieberthal* the conspiracy was aimed at preventing the opening of one bowling alley, as here it is aimed at preventing expansion of one hospital. In *Page* the court found that a conspiracy to control legal advertising in a local market would not substantially affect commerce in newsprint and other products, since by far the major consumers of such products remained untouched by the conspiracy; here, as noted in the body, the failure of Mary Elizabeth to expand could have no noticeable detrimental effect on the various lines of commerce suggested by HBC.

mis" has ever been an effective litmus for application of the Sherman Act, we doubt that it now is, and we are concerned that conventional impact analysis may sometimes conceal rather than reveal the true rationale of decision.

Rather than attempt a quantitative measurement of interstate involvement, we should, perhaps, consider instead the real danger, in a practical sense, of anti-competitive conduct to the flow of commerce, or the potential destructive power of a conspiracy. It seems to us that courts have been doing that for a long time without necessarily saying so. Such an approach is implicit in the format and choice of words of Mr. Justice Black in *United States v. Employing Plasterers Ass'n*, 347 U.S. 186 (1954). The opinion runs only three pages. The approach is a sweeping one suggesting indignation that a local group of people were "able to *dictate* who could and who could not buy plastering materials that had to reach Illinois through interstate trade if they reached there at all." 347 U.S. at 189 (italics added). Such restraints are characterized as capable of causing "unreasonable burdens on the free and uninterrupted flow of plastering materials into Illinois." *Id.* Notable by its absence is any quantitative analysis. Omitted is any detailed narrative of the type of commerce involved. Instead there is simply a note of impatience that any district judge could possibly have dismissed a Sherman Act complaint that alleged defendants' power to *control* the intrastate market.

Similarly, in *Burke v. Ford*, 389 U.S. 320 (1967), the Supreme Court peremptorily reversed a court of appeals in a two-page per curiam. The economics of the case and description of the commerce involved were reduced to a footnote. The Court focused not on how many bottles of bourbon went from place to place but on its apprehension that this *intra*state conspiracy would "invariably reduce competition" and cause a price increase. 389 U.S. at 321.

The evil of monopoly power is the theme of both *Employing Plasterers* and *Burke*. Not one word is said about whether the anticompetitive conduct substantially *or* insubstantially affects interstate commerce.

In our case there is no allegation that the Raleigh Group has the power to put HBC out of business, or indeed, upon a fair reading of the whole amended complaint, that it can do any more than delay, at most, whatever expansion seems economically wise to the plaintiff. In *Doctors, Inc.*, on the other hand, the plaintiffs alleged that defendants had the power to shut down a hundred hospitals. Thus the real difference between our case and *Doctors, Inc.* may be not so much the quantitative difference in effect on interstate commerce as the dramatic difference in anticompetitive *power*—the danger Congress sought to guard against. Viewed in such a manner the cases seem more persuasively different than if simply stuffed into their respective pigeonholes of insubstantial and substantial impact on interstate commerce.

AFFIRMED.

ADDENDUM

On December 17, 1974, after the preparation of the opinion in this case, the Supreme Court released its decision in *Gulf Oil Corp. v. Copp Paving Co.*, No. 73-1012. Mr. Justice Powell's opinion for the Court notes that the grant of certiorari was limited to questions arising under the Clayton and Robinson-Patman Acts. What is said about the Sherman Act, by way of comparison with those Acts, is not new, slip opinion at 7-8. Although dictum as to the Sherman Act, we think language on page 12 of the slip opinion is consistent with our belief that problems of application of trade control statutes cannot be solved by counting units of merchandise.

> The justification for an expansive interpretation of the "in commerce" language, if such an interpretation is viable at all, must rest on a congressional intent that the Acts reach all practices, even those of local character, harmful to the national marketplace. This justification, however, would require courts to look to practical consequences, not to apparent and perhaps nominal connections between commerce and activities that may have no significant economic effect on interstate markets.

WINTER, Circuit Judge, dissenting:

Although I concurred in the panel decision affirming the district court's dismissal of the amended complaint for failure to allege a sufficient nexus with interstate commerce to sustain a cause of action under the Sherman Act, I am now persuaded that the holding was incorrect. In my view, this amended complaint may not be dismissed *on the pleadings*. Of course, I express no view as to whether the jurisdictional allegations can be proved, but plaintiff should be afforded the opportunity to establish them, if not at trial, at least by a *prima facie* showing to defeat any motion by defendants for summary judgment. I therefore dissent from the majority's affirmance of the district court's dismissal of the amended complaint under Rule 12, F.R.Civ.P.

I

The amended complaint alleges that the action is brought to redress actions of the defendants which constitute "(1) a combination and conspiracy in restraint of trade in violation of Section 1 of the Sherman Act and (2) an attempt to monopolize in violation of Section 2 of the Sherman Act. . . ." Before the specific allegations of fact to support these jurisdictional assertions are considered, it is well to consider the scope of application of the Sherman Act. What combinations and conspiracies in restraint of trade and what attempts to monopolize does the Sherman Act prohibit?

There is no novelty in the answer. The settled law was recently restated in *Gulf Oil Corporation v. Copp Paving Company, Inc.*, —U.S.—, 43 L.W. 4059 (December 17, 1974). See also *Greenville Publishing Co. Inc. v. Daily Reflector, Inc.*, 496 F.2d 391, 395-96 (4 Cir. 1974). *Gulf Oil* was a case which turned on the jurisdictional requirements of § 2(a) of the Robinson-Patman Act and §§ 3 and 7 of the Clayton Act. It held that intrastate sales of asphalt for use in the construction of interstate highways were not sales "in commerce" within the ambit of the two Acts. In arriving at this result, the Court reviewed the jurisdictional scope of the two Acts and compared them with the jurisdictional scope of the Sherman Act.[1]

The Court contrasted the "in commerce" concept of the Robinson-Patman Act and the Clayton Act with the jurisdictional scope of the Sherman Act, saying:

> This "in commerce" language differs distinctly from that of § 1 of the Sherman Act, which includes within its scope all prohibited conduct "in restraint of trade or commerce among the several States, or with foreign nations. . . ." *The jurisdictional reach of § 1 thus is keyed directly to effects on interstate markets and the interstate flow of*

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[1] The Court noted that § 2(a) of the Robinson-Patman Act forbids "any person engaged in commerce, in the course of such commerce" to make price discriminations "where either or any of the purchases involved in such discrimination are in commerce" and where the effect of the discrimination is to suppress competition "in any line of commerce." It also recited that § 3 of the Clayton Act renders unlawful tie-in sales or exclusive dealing arrangements by "any person engaged in commerce" where the effect "may be to substantially lessen commerce or create a monopoly in any line of commerce," and that § 7, forbidding certain acquisitions, similarly applies to acquirers engaged "in commerce" and prohibits them from acquiring the stock or assets of another corporation engaged "in commerce" where the effect may be substantially to lessen competition "in any line of commerce in any section of the country." It concluded that application of both acts turned on the concept of "in commerce," defined in § 1 of the Clayton Act as "trade or commerce among the several States and with foreign nations. . . ."

goods. Moreover, our cases have recognized that *in enacting § 1 Congress "wanted to go to the utmost extent of its constitutional power in restraining trust and monopoly agreements. . . ." United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 558 (1944). Consistently with this purpose and with the plain thrust of the statutory language, the Court has held that, *however local its immediate object, a "contract combination . . . or conspiracy" nonetheless may constitute a restraint within the meaning of § 1 if it substantially and adversely affects interstate commerce. E.g., Mandeville Island Farms, Inc v. American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948). "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Manufacturing Association*, 336 U.S. 460, 464 (1949). (Emphasis in text added.) 43 L.W. at 4062.

With the standard of what the Sherman Act encompasses so clearly defined, I have no hesitancy in concluding that plaintiffs have alleged a sufficient adverse *effect* on interstate commerce to confer jurisdiction on the district court to decide the case on its merits.[2] Under *Gulf Oil*, the test is one of congressional power, and the question is whether Congress could reach the alleged conduct under the commerce power. This is the clear meaning of the statement that ". . . Congress 'wanted to go to the utmost extent of its constitutional power' . . ." The majority holds in effect that the alleged activity is too tenuously related to interstate commerce in a practical sense to justify federal regulation for antitrust reasons. In reaching this conclusion, the majority opinion, as its addendum demonstrates, applies a test designed for determining the jurisdictional ambit of the

[2] Of course, if the rendition of local hospital services was "in commerce," the Sherman Act would clearly apply. But no court has so held, and I think that the majority's conclusion that HBC's activities are not "in commerce" is a correct one.

Clayton and Robinson-Patman Acts. *Gulf Oil*, however, teaches that this test is inappropriate for actions brought under the Sherman Act. In any event, the majority's conclusion is based upon determinations of: (1) the quantitative impact on interstate commerce of the alleged conduct, assessed in terms of precedent sustaining and rejecting complaints, and (2) the qualitative importance of the anticompetitive power alleged in the complaint. By both, I think that proper application of the Sherman Act can be demonstrated.

II

As the majority opinion states, the conspiracy in which defendants allegedly engaged was to prevent Hospital Building Company (HBC) from expanding the capacity of its proprietary Mary Elizabeth Hospital in Raleigh, North Carolina, from 49 to 149 beds. HBC is a wholly-owned subsidiary of Charter Medical Corporation (Charter), which has its principal office in Macon, Georgia, and which, by contract, provides management services to HBC for a fee, including the negotiation of contracts for the purchase of hospital supplies. Suppression of the expansion, it was charged, was to enable defendants to reduce competition in local hospital services by HBC and to enable defendants to control the local hospital service market and thus to allocate it among themselves.

HBC averred that the alleged conspiracy had the following effects on interstate commerce:

> (1) It purchases approximately 80% of its supplies and medicines from vendors in states other than North Carolina. In 1972, excluding food and supplies for its kitchen, it purchased $112,846 of supplies for its radiology, medical laboratory, and electrocardiology operations and its pharmacy. If the hospital were enlarged from 49 to 149 beds, such purchases in interstate commerce would not only continue but increase substantially.

(2) It regularly uses interstate communication, including the mails, to carry out its operations. It pays Charter a fee under the management contract with it. The fee is based on gross receipts, and for 1972 the fee was approximately $36,000. If the hospital were expanded, the amount of the fee would increase substantially.

(3) The fees for hospital services and charges for many of the patients at the existing hospital are paid by insurors and other providers outside of North Carolina. Although not alleged, it may be inferred that if the hospital were expanded fees paid by out-of-state providers would increase substantially.

(4) If the hospital were increased from 49 to 149 beds, the cost thereof would exceed $4,000,000. That cost would be financed by one or more loans with one or more lenders located outside of North Carolina. Payment of principal and interest would extend substantially into the future, and it would require regular remittances to a lender outside of North Carolina.

Conclusorily, HBC alleged that the combination and conspiracy which it charged has "a substantial and direct effect on interstate commerce." I agree. The allegations establish the suppression of an interstate cash flow that would be both substantial and continuing. *Cf.* Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2 Cir. 1964). I therefore am of the view that jurisdiction was alleged to exist in accord with the test reiterated in *Gulf Oil*.

III

Doctors, Inc. v. Blue Cross of Greater Philadelphia, 490 F. 2d 48 (3 Cir. 1973), as the majority points out, is a stronger case than the instant one for concluding that the alleged conspiracy had a substantial effect on interstate commerce and

that the Sherman Act applied. In *Doctors*, the named plaintiff purchased $233,430 in supplies from out-of-state suppliers in the test year. Although this figure does not seem to be of any greater magnitude than the projected flow alleged by the plaintiff here, the majority relies on the fact that Doctors' Hospital was typical of the approximately one-hundred other hospitals in the area against all of which the conspiracy was directed, so that it could properly be inferred that interstate purchases of great magnitude were jeopardized. The distinction, however, is largely without difference. *Gulf Oil* reminds us that, in enacting § 1 of the Sherman Act, Congress was exercising to the *fullest extent* its constitutional power to restrain trusts and monopolies. Thus, it is not only the "big" resultant restraint on interstate commerce that it outlawed; the "little" resultant restraint on interstate commerce is outlawed too so long as a direct adverse effect on interstate commerce is demonstrated and that effect is not *de minimis*.

To be more specific, in *Doctors* the argument was advanced, as urged by the defendants here, that the object of the conspiracy was the intrastate activity of the rendition of hospital services and the effect on interstate commerce was indirect and insubstantial, so that the Sherman Act was inapplicable. In *Doctors*, the argument was rejected in terms which make that case a relevant and persuasive authority for reversing the district court in the instant case. Analyzing Burke v. Ford, 389 U.S. 320 (1967), and U.S. v. Employers Plasterers Ass'n, 347 U.S. 186 (1954), the Third Circuit pointed out that in both the Supreme Court found that a sufficient effect on the flow of out-of-state supplies to local businesses had been alleged to confer Sherman Act jurisdiction. 490 F.2d at 52. More importantly, "there [was not] even a concern with the specific magnitude of the impact on interstate commerce caused by the alleged conspiracy. Instead, the Court in each case ends its inquiry when it has satisfied itself that the logical and therefore probable effect of the alleged act is to reduce the flow of goods in interstate commerce." 490 F.2d at 53.

I recognize and accept that there are instances in which the effect on interstate commerce of anticompetitive conduct aimed at local activities may be too insubstantial to invoke Sherman Act jurisdiction. Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2 Cir. 1964) (the one-time equipping of a new local bowling alley), and Page v. Work, 290 F.2d 323 (9 Cir. 1961) (alleging conspiracy to control legal advertising, thus causing a newspaper specializing in such advertising to sell its assets to another publisher who continued the paper and continued to buy the same quantity of newsprint from out-of-state sources), are good examples. But the instant case is more like *Doctors* than *Lieberthal* and *Page*. If HBC were permitted to expand, its purchases in interstate commerce and its other interstate activities would increase. It follows that an alleged conspiracy to prevent its expansion has an adverse effect on interstate commerce—not *de minimis*—and should be held to support jurisdiction under § 1 of the Sherman Act.

IV

Similarly, I view the anticompetitive power alleged here as substantial. In essence the plaintiffs allege that a local conspiracy was able to forestall out-of-state entry into the local hospital market. If by means of conspiracy and harassment those who hold a local market can foreclose or limit the entry of competition, capital, and initiative from out-of-state, then it seems to me that the federal interest in interstate commerce is directly involved. To conclude, as the majority does, that the plaintiffs here do not allege the kind of anticompetitive power which "Congress sought to guard against" is merely to disbelieve the plaintiff's allegations. In the Sherman Act, not only the "evil of monopoly power," but the evil of improper attempts to achieve it are condemned. Where, as here, the out-of-state plaintiffs suggest that local official power and processes were used to delay and deter them, the plaintiffs implicate not only antitrust policy as such, but also the "national market" concerns which animate the commerce clause itself.

HBC's allegations about the flow of financing, management services, and supplies to the hospital from out-of-state have been stated. Additionally, HBC alleges that the overwhelming majority of the fees paid to it come from the federal government and from out-of-state providers. Money thus flows from Blue Cross, private insurers, and the federal government to the hospital and thence to out-of-state suppliers, managers, and financiers. While this construction of the facts may not put HBC's provision of hospital services in the "flow" of commerce as that term is used in the case law, it does make it graphically clear that if HBC is affected, a wide range of interstate connections is affected.

There is, furthermore, a clear and significant federal interest in at least one of these connections—the interstate flow of medicare and medicaid payments, and more generally with the costs of medical care in Wake County. Actual or attempted monopolization of the local market could have a dramatic effect, not only to decrease the flow of hospital payments, but to increase the cost of hospital care in the Raleigh area as well. If hospital care costs are increased, insurance costs will also increase, and federal and out-of-state providers will spread these increased costs beyond the local area in which they are incurred. And this is so even if the overall market for hospital care in the Raleigh area is neither increased nor diminished, but only concentrated in the hands of the hospital defendants.

Under all these circumstances, I think it myopic to maintain that the service itself is rendered locally. Local patient care may be the hub of hospital operation, but the spokes—financing, supplies, management, and fee payments—all have out-of-state implications. The hub cannot be braked without affecting the spokes.

Judge Butzner and Judge Field authorize me to say that they, too, dissent and concur in this dissenting opinion.

APPENDIX B

Order

(Filed June 11, 1974)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1627

Hospital Building Company,

Appellant,

v.

Trustees of The Rex Hospital, a Corporation; Joseph Barnes; George Stockbridge; Richard Urquhart, Jr.,

Appellees.

Order

The petition for rehearing of Hospital Building Company, containing a suggestion for rehearing in banc, has been referred to the entire court. A poll on the suggestion for rehearing was requested and a majority of the judges eligible to vote have voted to grant rehearing in banc.

Accordingly, it is ORDERED that the motion for rehearing in banc be, and it is hereby, granted; the previous opinion of the panel is withdrawn; and the Clerk is directed to restore the case to the hearing calendar and to fix a date for rehearing in banc during a regular session of the court as soon as practicable. The Clerk is further directed to fix a schedule for the filing of supplemental briefs if either of the parties desires to file the same.

For the Court:

/s/ HARRISON L. WINTER
United States Circuit Judge

APPENDIX C

Opinion

(Filed February 6, 1974)

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 73-1627

Hospital Building Company,

Appellant,

v.

Trustees of The Rex Hospital, a Corporation; Joseph Barnes; George Stockbridge; Richard Urquhart, Jr.,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F. T. Dupree, Jr., District Judge.

Argued December 6, 1973 Decided: February 6, 1974

Before BRYAN, WINTER and WIDENER, Circuit Judges.

John K. Train, III (John R. Jordan, Jr., Timothy S. Perry, Jordan, Morris and Hoke, Alston, Miller & Gaines, on brief) for Appellant; Ray S. Bolze (Thomas W. Steed, Jr., John H. Anderson, John R. Fornaciari, Allen, Steed & Pullen, Smith, Anderson, Blount & Mitchell, Howrey, Simon, Baker & Murchison, on brief) for Appellees; (Carl Weissburg, Lawrence E. Mindell, Weissburg, Jacobs and Gerst, on brief for Amicus Curiae Federation of American Hospitals).

PER CURIAM:

After oral argument, review of the briefs and review of the record, we are not persuaded that the district court was in error when it concluded that the effect of defendants' alleged conspiracy in restraint of trade was neither to restrain activities in the flow of interstate commerce nor to restrain local activities having a substantial effect on interstate commerce.

AFFIRMED.

APPENDIX D

Opinion

(Filed March 23, 1973)

In the United States District Court
for the Eastern District of North Carolina
Raleigh Division

Hospital Building Company, Plaintiff vs. Trustees of the Rex Hospital, a Corporation; Joseph Barnes; George Stockbridge; Richard Urquhart, Jr., Defendants	Civil No. 4048

Order

The plaintiff, a North Carolina corporation, which operates a private hospital for profit in the City of Raleigh, has brought this civil antitrust action against the defendant Rex Hospital, also located in Raleigh, the defendant, Joseph Barnes, its administrator, and Richard Urquhart, Jr., one of its trustees. The defendant, George Stockbridge, is executive secretary of the Health Planning Council for central North Carolina. Jurisdiction has been involved under the Sherman Act, 15 U.S.C. §§ 1 and 2. Alleging violations of these statutes, the complaint charges defendants, and certain other named "co-conspirators" not made parties to the action, with having "engaged in an unlawful combination and conspiracy in unreasonable restraint of . . . trade and commerce in the furnishing of medical-surgical hospital services" and "an attempt by defendant Rex to monopolize, and to conspire . . . to attempt to monopolize, the paid hospital business conducted by non-public hospitals in the Ral-

eigh area . . ." The case is before the court on the motions of the defendants to dismiss for lack of subject matter jurisdiction and the failure of the complaint, as amended, to state a claim upon which relief can be granted.

Central to defendants' motions is the contention that the facts alleged by plaintiff do not show that the alleged wrongdoing on the part of defendants has affected interstate commerce in a direct and substantial way necessary to invoke the provisions of the Sherman Act. To meet the challenge of these motions the plaintiff filed an amendment to its complaint alleging with more specificity the scope of its activities in interstate commerce which the alleged wrongdoing of defendants is affecting. The allegations of the amendment to the complaint may be briefly summarized as follows:

> 1. Plaintiff is the wholly-owned subsidiary of a Delaware corporation which owns, directly or indirectly, and operates or manages medical-surgical hospitals in five states and Puerto Rico.
>
> 2. Plaintiff purchases on a regular and continuing basis substantial amounts of goods, supplies and medicines from vendors in states other than North Carolina.
>
> 3. Plaintiff regularly utilizes interstate communications, including the mails, telephone and telegraph to carry on its business.
>
> 4. A substantial number of persons regularly come from states other than North Carolina to the Raleigh area for treatment in medical-surgical hospitals.
>
> 5. Plaintiff receives a substantial part of its revenue from medicare, medicaid and hospital insurance benefits from insurance companies located outside North Carolina.
>
> 6. The planned expansion of plaintiff's present facilities will cost in excess of four million dollars which will be financed through one or more lenders located outside North Carolina.

> 7. Plaintiffs present hospital is accredited by the Joint Commission on Accreditation of Hospitals, a national organization which promulgates standards for the operation of hospitals.

These various activities show unmistakably that the plaintiff engages in transactions in interstate commerce, but it does so only incidentally to the conduct of its principal business which is that of operating a hospital in Raleigh, North Carolina. All of the cases involving hospital and medical services seem to indicate that this is strictly a local, intra-state business. *United States v. Oregon State Medical Society*, 343 U.S. 326 (1952); *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167 (8th Cir. 1959), *cert. denied*, 361 U.S. 884 (1959); *Riggall v. Washington County Medical Society*, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958); *Robinson v. Lull*, 145 F. Supp. 134 (N.D.Ill. 1956); *Spears Free Clinic and Hospital for Poor Children v. Cleere*, 197 F.2d 125 (10th Cir. 1952). Yet it is the conduct of this business of the plaintiff upon which the alleged unlawful restraint of defendants is operating, not those interstate activities which plaintiff finds necessary or expedient in the conduct of its hospital business.

But,

> "The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." *Page v. Work*, 290 F.2d 323, 330 (9th Cir. 1961).

The conclusion is that the conduct of the defendants complained of in this case directly affects only a local activity of the plaintiff, and only incidentally and insubstantially does it affect

interstate commerce. The Sherman Act has therefore not been properly invoked, and the court is without subject matter jurisdiction. *Lieberthal v. North Country Lanes, Inc.*, 332 F.2d 269 (2nd Cir. 1964).

Accordingly, it is now Ordered that the motions of the defendants are allowed and the action is dismissed.

United States District Judge

March 23, 1973

/s/ F. T. DUPREE, JR.

APPENDIX E

Opinion

(Filed April 7, 1975)

ST. BERNARD GENERAL HOSPITAL INC., Plaintiff-Appellant,

v.

HOSPITAL SERVICE ASSOCIATION OF NEW ORLEANS, INC., et al., Defendants-Appellees.

No. 74-2186.

United States Court of Appeals, Fifth Circuit.

April 7, 1975.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BELL, THORNBERRY and GEE, Circuit Judges.

THORNBERRY, Circuit Judge:

This is an appeal from a judgment dismissing an antitrust complaint for want of federal jurisdiction. We reverse and remand.

The facts necessary to our decision were well stated by the district court in an unpublished opinion, from which we generously borrow for purposes of our statement of the case. The

plaintiff, St. Bernard General Hospital, Inc. ("St. Bernard"), instituted this suit as a class action to recover treble damages for alleged violations of § 1 of the Sherman Act, 15 U.S.C. § 1. The defendant, Hospital Service Association of New Orleans, Inc. ("Hospital Service"), is a non-profit mutual insurance association established to provide payment in favor of subscribers for the expense of complete hospital care. Hospital Service obtained a license to use the trade name "Blue Cross" in order to sell hospitalization insurance under the Blue Cross plan in the parishes of Orleans, Jefferson, St. Charles, Plaquemine, and St. Bernard. The licensor, American Hospital Association, was originally named a defendant but was later dismissed. No appeal was taken from the order dismissing American Hospital Association.

Very basically, the Blue Cross plan involves group prepayment of hospital charges to Hospital Service with a reciprocal agreement by member hospitals to render medical services to subscribing insureds. The member hospitals are compensated by Hospital Service for the medical assistance they provide to subscribers. The universe of eligible subscribers includes not only residents of the five local parishes, but also any Blue Cross insured who holds a policy issued by another licensee of American Hospital Association. Thus, it can and does occur that a New York resident may receive treatment in a New Orleans member hospital pursuant to a Blue Cross policy issued by a New York licensee. Conversely, a New Orleans subscriber with Hospital Service is eligible for insured treatment in a New York member hospital. These non-resident claims and charges are settled through a clearing house process which is utilized by the various plans across the country on a monthly collection basis. If a subscriber is treated at a non-member hospital, Hospital Service will make the reimbursement specified by the subscriber's policy to the insured or to the non-member hospital, if the insured has executed an assignment. The

subscriber's coverage, however, is less comprehensive when a non-member hospital performs treatment.

Hospital Service originally consisted of the Touro Infirmary, the Southern Baptist Hospital, the Mercy Hospital, and the Hotel Dieu. In the health insurance trade these are known as "participating" hospitals, and they are so termed in their contracts with Hospital Service. Today there are other "participating" hospitals in the greater New Orleans area: the Ear, Eye, Nose and Throat Hospital, the Flint-Goodridge Hospital, the Oschner Foundation, the Sara Mayo Hospital, and the West Jefferson Hospital. In order to acquire "participating" status a hospital must meet several requisites: it must be accredited, it must be operated on a non-profit basis,[1] and it must enter into a particular kind of contract with Hospital Service. The contract requires the hospital to render medical services to subscribing insureds and entitles it to compensation from Hospital Service for the necessary and proper charges billed to the insured. In return, the "participating" hospital agrees to bear a portion of the expense of underwriting Hospital Service if the association becomes insolvent or its reserves become inadequate. The "participating" hospitals do not exist entirely at the mercy of events, however, for each is afforded two seats on Hospital Service's Board of Managers, and each is entitled to vote for remaining managers who are elected at large.

Hospitals like the plaintiff and its fellow class members, which operate for profit, may also become members of Hospital Service. They do so by signing a contract under which they are known as "contracting" hospitals. Presently there are ten such "contracting" hospitals, including St. Bernard, in the New Or-

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[1] In its submission to the district court and in its brief to this court plaintiff, St. Bernard, contended that at least one of these "participating" hospitals, the Oschner Foundation, in fact earns a profit from its services. Because of the nature of the district court's ruling, discussed *infra*, no finding or opinion was expressed with respect to this contention. Consequently, we express none.

leans area. These members have no voting rights in the election of Hospital Service's management. On the other hand, they have no obligation to underwrite the association in case of insolvency or depleted reserves.

This lawsuit revolves around the contractual provisions between the for-profit hospitals and Hospital Service as those provisions detail the manner in which a "contracting" hospital is compensated for Blue Cross-insured treatment. The contracts provide that Hospital Service will reimburse 100% of the charges billed to the subscriber. Such reimbursement, however, may not exceed the average per diem payment or the average per case payment made to "participating"—i.e., non-profit—hospitals. Thus, the parties stipulate that for-profit hospitals like the plaintiff have been and will be required in various years to rebate to Hospital Service amounts collected from the association in excess of the average wholesale cost of services rendered at non-profit hospitals.

In its complaint, plaintiff alleged that these required rebates are fixed arbitrarily by the defendant and the "participating" members; that this so-called "premium to do business" with the defendant constitutes the product of an unlawful agreement in restraint of interstate commerce; and that the contractual scheme has injured plaintiff and its fellow for-profit hospitals by forcing them either to forfeit all profit on Blue Cross business and at times incur losses, or else pass the amount of the rebate on to the insured patient, which presumably would encourage Blue Cross subscribers to utilize only the "participating" non-profit hospitals. In its brief, plaintiff alleges more specifically a group boycott by the defendant and "participating" hospitals, which plaintiff asserts is a per se violation of Sherman Act, § 1.

The merits of the dispute were not reached below; indeed no answer was ever filed. Instead, defendant Hospital Service tendered a motion to dismiss for lack of jurisdiction or alternatively for failure to state a claim. Upon the submission of affidavits and depositions in the nature of summary judgment proof, the district court considered only the jurisdictional question. The plaintiff argued that jurisdiction should be sustained, either because for-profit hospitals render occasional services to out-of-state residents, or because hospitals must purchase drugs, equipment, and supplies from out-of-state sources in order to deliver health care at the local level. Although the complaint did not allege specific quantities or dollars-and-cents representing interstate purchases by plaintiff or any member of its class, the defendant did not attack the sufficiency of the pleadings. Rather, the defendant and the district court both took the position that whether plaintiff treated out-of-state patients or purchased products in interstate commerce was essentially immaterial to the question of Sherman Act jurisdiction.

Accordingly, relying on Page v. Work, 9th Cir. 1961, 290 F.2d 323,[2] several recent district court cases,[3] and a few earlier cases from other Circuits,[4] the court ruled that its inquiry was confined to one of characterizing the precise activity upon which the alleged restraint most directly impacted. Having determined that activity to be the rendition of hospital services, the court required that the activity itself either constitute an enterprise in interstate commerce, or, if predominately intrastate, that it "substantially affect" interstate commerce. The

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[2] "The test of jurisdiction is not that the act complained of affect a business engaged in interstate commerce but that the conduct complained of affects the interstate commerce of such business." 290 F.2d at 330.

[3] Nankin Hospital v. Michigan Hospital Service, E.D.Mich. 1973, 361 F.Supp. 1199; Doctors, Inc. v. Blue Cross of Greater Philadelphia, E.D.Pa. 1973, 360 F.Supp. 693; Hospital Building Co. v. Trustees of Rex Hospital, E.D.N.C. 1973, 1973 Trade Cas. ¶ 74,428.

[4] Elizabeth Hospital, Inc. v. Richardson, 8th Cir. 1959, 269 F.2d 167, cert. denied, 361 U.S. 884, 80 S.Ct. 155, 4 L.Ed.2d 120; Riggall v. Washington County Medical Society, 8th Cir. 1957, 249 F.2d 266, cert. denied, 355 U.S. 954, 78 S.Ct. 540, 2 L.Ed.2d 530 (1958); Spears Free Clinic and Hospital for Poor Children v. Cleere, 10th Cir. 1952, 197 F.2d 125.

district court then held as a matter of law "that the rendition of hospital services is a purely local activity." Therefore, it concluded, "the practice of the defendant is allegedly restraining a local activity of the plaintiff not in interstate commerce, and the Sherman Act is inapplicable, unless the plaintiff can demonstrate that the alleged restraint of the local function 'substantially affects interstate commerce'."

Applying this latter part of its holding, but without any weight to plaintiff's jurisdictional arguments, the district court rejected plaintiff's contention with respect to treating out-of-state patients on the assumption that the likelihood that such a patient would seek treatment at a particular hospital is too incidental or "remote." As for the argument based on drugs and supplies purchased in interstate commerce, the court stated that "[w]hat is essentially an intrastate activity is not transformed into interstate commerce by reason of such purchases, and there exists no substantial effect on interstate commerce by indirect effect of reducing prospective purchases of supplies in interstate commerce."

In the context of this class action involving allegedly predatory agreements imposed by Hospital Service upon ten for-profit hospitals, we reject the district court's scheme of analysis. Specifically, we disagree with the court's purely-local-as-a-matter-of-law premise from which all conclusions, as well as the putative absence of a "substantial effect" on interstate commerce followed. On the other hand, we are not entirely convinced that the plaintiff has made a sufficient showing to sustain Sherman Act jurisdiction. For example, plaintiff asserted neither in its complaint nor in its submissions below that defendant's conduct has caused or will cause any member of the complaining class to cease treating patients from other states or to curtail purchases of supplies from interstate sources. As matters currently stand, plaintiff essentially contends that certain contract provisions simply prevent New Orleans area for-profit hospitals

from earning a profit on Blue Cross business. Hence, we reverse the judgment below solely on the basis of its unbending legal position. On remand, all issues—including the sufficiency of the complaint for purposes of Sherman Act jurisdiction—will be open for full consideration in light of whatever amendments the parties may offer, the evidence as it develops, and the factors we mention in the following discussion.

At the outset, we note that this court has already rejected the narrow reading of Page v. Work, *supra*, which permeates the district court's decision. In Lehrman v. Gulf Oil Corp., 5th Cir. 1972, 464 F.2d 26, 36, cert. denied, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665, we stated:

> We do not accept the suggestion that Page v. Work holds, as a matter of law, that a conspiracy to restrain trade in an intrastate product cannot, as a matter of law, affect trade in another, interstate product sufficiently to trigger Sherman Act jurisdiction. The focus of the Act is to protect interstate trade from interferences of all degrees of subtlety. The concept of interstate commerce is a practical one. The interstate nerves of a local business can be deadened swiftly by a conspiracy the object of which happens to be the intrastate aspect of a plaintiff's business. We see no reason why the federal courts should confine themselves to protecting against interferences with interstate commerce which, quite fortuitously, turn out to have motivated the actions of a defendant. It is the effect on commerce that determines federal jurisdiction under the Sherman Act and not any notion of the "interstate culpability" of those who engage in anticompetitive practices. No matter how intrastate the objects of anticompetitive conspirators, they must take their victims' involvement in interstate commerce as they find them.

Significantly, *Lehrman*, like this case, involved allegedly illegal practices perpetrated most visibly at the local level. Never-

theless, numerous businesses were victimized in that, *inter alia*, the defendant's conduct reduced their ability to purchase and sell goods from interstate commerce. This factor in itself was held to constitute one alternative basis of Sherman Act jurisdiction. Concerning the defendant's argument that, assuming some effect on interstate commerce the effect was jurisdictionally insufficient because purchased items often "came to rest" intrastate before resale, we noted that the requisite effect is nonetheless accomplished by "a reduced or altered flow of goods into the State . . . from without the state." Thus, "Lehrman's business did have an impact on interstate commerce that was not 'insignificant or insubstantial.'" *Id.* at 35. *See also* Copper Liquor, Inc. v. Adolph Coors Co., 5th Cir. 1975, 506 F.2d 934, at 949. In other words, it was not *de minimis*.

Subsequent to *Lehrman*, we have had occasion to consider and reaffirm its broad jurisdictional implications for Sherman Act cases. In Battle v. Liberty National Life Ins. Co., 5th Cir. 1974, 493 F.2d 39, a class action was brought by a group of Alabama funeral homes contesting allegedly illegal burial policy arrangements whereby "authorized" funeral homes—i. e., those that entered into service contracts with the defendants—were reimbursed for a greater range of services to insureds than were the non-contracting, or "unauthorized," homes. Although we observed that the case was not adequately developed to permit a conclusive determination of jurisdiction, we recognized that certain of plaintiffs' allegations, if substantiated, would establish Sherman Act jurisdiction under *either* the "in commerce" or "substantial effect" tests. Among these allegations were: that the plaintiffs used caskets purchased out-of-state in performing services under the burial policies; that they purchased clothing, embalming fluids, and other funeral necessities from out-of-state sources; and that they performed funeral services under the policies for residents of other states who died in Alabama. We stated that "[i]f these facts are established, it appears that such activities, when considered *in the aggregate*, would have a sub-

stantial impact on interstate commerce [i. e., not "insignificant or insubstantial"], and thus satisfy the jurisdictional requirement under the Sherman Act." 493 F.2d at 48 (emphasis ours).

Besides citing *Lehrman*, the *Battle* court cited Doctors, Inc. v. Blue Cross of Greater Philadelphia, 3rd Cir. 1973, 490 F.2d 48, reversing D.C., 360 F.Supp. 693. In the case *sub judice* the district court relied heavily on the lower court decision in *Doctors, Inc.* The Third Circuit's reversal apparently was not brought to its attention. In any event, we consider the Third Circuit's opinion well-reasoned, its distinctions of the authorities relied on by the court below soundly-drawn, and its rationale consistent with our decisions in *Lehrman* and *Battle*. Furthermore, *Doctors, Inc.* is in substance indistinguishable from the instant case with the one exception that our plaintiff's pleading is less specific in terms of allegations necessary to establish the interstate connections required for Sherman Act jurisdiction. *Compare* 490 F.2d at 50 nn. 3, 3a. Nevertheless, we emphasize that this case has proceeded as if the sole question were purely legal; no challenge to the sufficiency of the jurisdictional pleadings or the jurisdictional proof has been entered. Therefore, we do not believe that this one distinction should alter our conclusions.

In summary, we have not held that plaintiff St. Bernard has sustained Sherman Act jurisdiction, either for itself or for the class it seeks to represent. We have only held that, on remand, a proper view of the posture of this case in light of controlling precedent entitles the plaintiff to establish its right to a day in federal court. We do not consider our disposition to be in conflict with the very recent *en banc* opinion by the Fourth Circuit in Hospital Building Co. v. Trustees of the Rex Hospital, 4th Cir. 1975, No. 73-1627, — F.2d —.[5] There, with three judges

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[5] Nor is United States v. Oregon State Medical Society, 343 U.S. 326, 72 S.Ct. 690, 96 L.Ed. 978 (1952), to the contrary. There, in a Sherman Act injunction suit brought by the government, the district court had found as fact that "[t]he sale of medical services, by

dissenting, the Fourth Circuit affirmed the dismissal of a single small hospital's Sherman Act complaint for lack of jurisdiction.[6] We believe the court's distinction of *Doctors, Inc.* likewise fully distinguishes the circumstances of this case. As the Fourth Circuit majority put it:

> There is simply no significant comparison between the effect on commerce of one small hospital's delayed expansion [which was the sole injury alleged by the plaintiff], especially when other hospitals contemplate expansion, and the vastly greater effect of the possible closing of a significant percentage of the hospitals in a metropolitan area.

In this case, of course, fully ten of the nineteen New Orleans area Blue Cross member hospitals comprise the plaintiff class. Also, we note that the Fourth Circuit announced its decision not without considerable trepidation, terming it "a rare exception to prove the rule that judgments on the pleadings in antitrust cases will ordinarily be reversed." In view of this cautionary reminder, we are not disturbed that the logic of *Hospital Building Co.* argues for a result contrary to that which we have reached. Instead, we believe that our decision accords with the proposition to which we, as well as the Fourth Circuit, are firmly committed:

> There is no bright line dividing cases in which the effect upon interstate commerce is sufficient to permit Congress

Doctor Sponsored Organizations, as conducted within the State of Oregon, is not trade or commerce within the meaning of Section 1 of the Sherman Anti-Trust Law. . . ." 343 U.S. at 338, 72 S.Ct. at 698, 96 L.Ed. at 987. The Supreme Court upheld this finding as not clearly erroneous, stating, "[t]he appeal brings to us no important questions of law or unsettled problems of statutory construction. . . . Its issues are solely ones of fact." 343 U.S. at 330, 72 S.Ct. at 694, 96 L.Ed. at 983. In this case, by contrast, no testimony has yet been presented and no facts have been found.

[6] See note 3, *supra*.

> to prohibit particular anticompetitive activity under the commerce clause from those cases in which it is not sufficient. In this area perhaps more than in most, each case must turn on its own facts.

Rasmussen v. American Dairy Association, 9th Cir. 1973, 472 F.2d 517, 526, cert. denied, 412 U.S. 950, 93 S.Ct. 3014, 37 L.Ed.2d 1003; *Hospital Building Co., supra*.

Reversed and remanded.

Supreme Court, U. S.
FILED
JUL 31 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 74-1452

HOSPITAL BUILDING COMPANY,
Petitioner,

vs.

TRUSTEES OF THE REX HOSPITAL, a Corporation, JOSEPH BARNES, GEORGE STOCKBRIDGE, and RICHARD URQUHART, JR.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

JOHN K. TRAIN, III
TIMOTHY S. PERRY
ALSTON, MILLER & GAINES
1200 C&S National Bank Building
Atlanta, Georgia 30303
(404) 588-0300
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 74-1452

HOSPITAL BUILDING COMPANY,
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Respondents.

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

This Supplemental Brief is filed by the petitioner Hospital Building Company (hereafter "HBC") to call attention to the impact of the unanimous decision of this Court in *Goldfarb v. Virginia State Bar*, — U.S. —, 43 U.S.L.W. 4723 (June 16, 1975), on the issues raised in HBC's Petition for Writ of Certiorari. (Justice Powell did not participate in that decision.)

DISCUSSION

In *Goldfarb* this Court rejected the argument that anticompetitive conspiracies in the providing of local services cannot substantially affect interstate commerce and thereby be subject

to the Sherman Act. This Court viewed the providing of legal services in *Goldfarb* as part of an interstate transaction and stated further that an anticompetitive restraint of such services, as a practical matter, substantially affected interstate commerce.

In holding the legal services in *Goldfarb* to be part of an interstate transaction, this Court highlighted the interstate financing of real estate transactions, particularly the involvement of out-of-state lenders and the role of instrumentalities of the federal government in guaranteeing that financing. These elements of financing were the interstate aspects of "conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states." (43 U.S.L.W. 4727). There was no requirement that the conspiracy alleged be "directed" at this interstate financing. It was sufficient that the conspiracy affected a local service that was an essential part of the interstate transaction.

In the instant case, just as out-of-state lenders and the federal government financed the purchase of real property and of ancillary legal services in *Goldfarb*, national health insurance companies and the federal government through the Medicare and Medicaid programs finance the purchase of hospital services.

As HBC argued in the instant case, the providing of hospital services is a central part of an interstate transaction. The construction by HBC of its expanded hospital is to be financed by out-of-state lenders and the additional supplies necessary for providing hospital services at the expanded hospital are to be purchased in interstate commerce. Payment for the hospital services provided by HBC now and in the future is made almost entirely by national health insurance companies and by the federal government through Medicare and Medicaid programs. There is, therefore, a flow of construction financing money and supplies in interstate commerce to HBC which enables it to provide services paid for in turn by a flow of money in interstate commerce to HBC from national health insurance companies and the federal government. As this Court observed in *Goldfarb:*

> "The County Bar relies on *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), to support its argument that the 'essentially local' legal services at issue here are beyond the Sherman Act. There we held, *inter alia*, that intrastate taxi trips that occurred at the start and finish of interstate rail travel were 'too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act. 332 U.S., at 230. The ride to the railway station, we said, '[f]rom the standpoints of time and continuity . . . may be quite distinct and separate from the interstate journey.' *Id.*, at 232. Here, on the contrary, the legal services are coincidental with interstate real estate transactions in terms of time, and more important, in terms of continuity they are essential. Indeed, it would be more apt to compare the legal services here with a taxi trip between stations to change trains in the midst of an interstate journey. In *Yellow Cab* we held that such a trip was a part of the stream of commerce. *Id.*, at 228, 229."

Moreover, the providing of hospital services is not merely an inseparable part of the interstate transaction as were the legal services in *Goldfarb*, it is the core of that interstate transaction, and it is this core which the alleged conspiracy in the instant case seeks to monopolize and restrain.

The substantiality of the effect on interstate commerce of the alleged conspiracy in this case is apparent. The monopolization and anticompetitive restraints alleged affect the price paid by the federal government and national health insurance companies for such services by all competitors *in the entire market*, not merely the price of services charged by HBC. Likewise, such restraints also affect the flow of supplies in interstate commerce to all competitors in the entire market.

In *Goldfarb*, the small increase in the price of legal services ancillary to the substantial volume of real estate purchases was a sufficient effect on interstate commerce to justify jurisdiction under the Sherman Act without any showing of the specific magnitude of the effect nor of any actual increase in price. In the instant case, the conspiracy does not affect an ancillary service (such as doctors' fees) but directly affects the price of hospital services themselves. The substantial effect of the alleged conspiracy in the instant case was highlighted by Judge Winter, dissenting in the Court of Appeals below as follows:

> "Actual or attempted monopolization of the local market could have a dramatic effect, not only to decrease the flow of hospital payments, but to increase the cost of hospital care in the Raleigh area as well. If hospital care costs are increased, insurance costs will also increase, and federal and out-of-state providers will spread these increased costs beyond the local area in which they are incurred. And this is so even if the overall market for hospital care in the Raleigh area is neither increased nor diminished, but only concentrated in the hands of the hospital defendants."

HBC has clearly shown a substantial effect on interstate commerce as a result of the alleged conspiracy, and, as this Court noted in *Goldfarb*, "once an effect is shown, no specific magnitude need be proved." Certainly the purchasers of hospital services (who finance such purchases through national health insurance companies and the federal government) are being denied the benefits of free competition as were the purchasers of legal services in *Goldfarb*.

CONCLUSION

In *Goldfarb*, this Court reaffirmed its previous decisions stating the breadth of jurisdiction under the Sherman Act. The decision of the Court of Appeals below is in conflict with the decision of this Court in *Goldfarb*.

The Petition for Writ of Certiorari should be granted and the decision below reversed and remanded for trial on the merits.
Dated: July 7, 1975.

Respectfully submitted

JOHN K. TRAIN, III

TIMOTHY S. PERRY
ALSTON, MILLER & GAINES
1200 C&S National Bank Building
Atlanta, Georgia 30303
Counsel for Petitioner

Certificate of Service

I, John K. Train, III, member of the firm of Alston, Miller & Gaines, Atlanta, Georgia, do hereby certify that I caused copies of the Supplemental Brief for Petitioner in *Hospital Building Company v. The Trustees of Rex Hospital, et al.*, October term, 1974, Docket No. 74-1452, this 7th day of July, 1975, by

mailing copies thereof, Air Mail, postage prepaid, to be served on the following:

Mr. Thomas W. Steed, Jr.
Allen, Steed & Pullen
P. O. Box 2058
Raleigh, North Carolina 27602

Mr. John H. Anderson
Smith, Anderson, Blount & Mitchell
P. O. Box 750
Raleigh, North Carolina 27602

Mr. Lillard H. Mount
Hofler, Mount, White & Long
P. O. Box 2006
Durham, North Carolina 27702

Messrs. Ray S. Bolze and John R. Fornaciari
Howry, Simon, Baker & Murchison
1730 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

/s/ John K. Train, III

Supreme Court, U. S.
FILED
NOV 20 1975

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1452

HOSPITAL BUILDING COMPANY,
Petitioner,

vs.

TRUSTEES OF THE REX HOSPITAL, a Corporation, JOSEPH BARNES, GEORGE STOCKBRIDGE, and RICHARD URQUHART, JR.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 19, 1975
CERTIORARI GRANTED OCTOBER 6, 1975

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GENERAL DOCKET

United States Court of Appeals
for the Fourth Circuit

Case No. 73-1627

Appeal From the United States District Court for the
Eastern District of North Carolina, at Raleigh

Date		Filings—Proceedings
1973		
May	25	Record on appeal in one volume (Vol. I) filed and appeal docketed.
May	25	Transcript of Motions heard before Judge Dupree on 2/22/73 in one volume (Vol. II) filed.
June	4	Memorandum in support of Motion to dismiss Complaint and Brief in Opposition to defendants motions to dismiss (Supplement to record on appeal) received from the clerk of the district court at Raleigh, N. C.
June	5	Appearance for the appellant filed and entered.
June	5	Appearance for the appellees filed and entered.
June	5	Appearance for the appellees filed and entered.
June	8	Appearance for the appellant filed and entered.
June	8	Appearance for the appellees filed and entered.
July	3	Motion of the Federation of American Hospitals for leave to file amicus brief and affidavit of Lawrence E. Mindell in support thereof filed. Motion granted.

July 3 Twenty-five (25) copies of amicus brief in support of the appellant filed.

July 5 Twenty-five (25) copies of the appellant's brief filed.

July 5 Ten (10) copies of the appellant's appendix filed.

July 16 Appellee's motion to vacate the grant of leave to file an amicus curiae brief and alternatively to strike extra-record evidence contained therein filed.

July 23 Memorandum in opposition to appellees' motion to vacate leave to file an amicus curiae brief and alternatively to strike extra-record evidence contained therein filed.

July 23 Order denying appellees' motion to vacate the grant of leave to file an amicus curiae brief filed.

July 23 Memorandum in opposition to motion of appellees to vacate the grant of leave to file an amicus curiae brief and alternatively to strike extra-record evidence contained therein filed by the "Federation".

July 30 Twenty-five (25) copies of the appellant's brief filed.

Aug. 6 Twenty-five (25) copies of the appellee's brief filed.

Aug. 6 Twenty-five (25) copies of the appellee's brief (for Stockbridge) filed.

Aug. 22 Twenty-five (25) copies of the appellant's reply brief filed.

Nov. 14 Notice of oral argument mailed to Jordan, Train, Perry, Mindell, Steed, Bolze, and Anderson.

Dec. 6 Cause argued before Bryan, Winter, and Widener, Circuit Judges, and submitted.

Dec. 7 Appearance for the appellees filed and entered.

1974

Feb. 6 Per curiam opinion filed. (HLW)

Feb. 6 Opinion and clerk's memorandum mailed to counsel of record. (Copy of opinion mailed to the clerk of the district court.

Feb. 6 Judgment of the district court affirmed. Judgment filed.

Feb. 13 Record of appeal in two volumes and supplement to record sent to Judge Blatt's office. They are to return it to district court in Raleigh.

Feb. 15 Appellee's verified bill of costs filed.

Feb. 20 Petition for rehearing and suggestion for rehearing en banc filed.

Mar. 1 Record on appeal returned by Judge Blatt's office to the Clerk of the District Court at Raleigh, N. C.

June 3 Supplemental motion for rehearing and request for hearing en banc filed.

June 11 Order granting the request that the case be reheared in banc filed. (foc)

Sept. 16 Twenty-five (25) copies of the appellee's brief for Stockbridge filed. wc

Sept. 16 Twenty-five (25) copies of the appellee's brief filed. (wtc) Supplemental.

Sept. 17 Twenty-five (25) copies of the appellant's supplemental brief filed. wtc

Oct. 3 Cause argued en banc before Haynsworth, Chief Judge, Bryan, Senior Circuit Judge, Winter, Craven,

Butzner, Russell, Field and Widener, Circuit Judges, and submitted. (wu)

1975

Feb. 18 Opinion filed. JBC Judges Winter, Butzner and Field dissenting. (wu)

Feb. 18 Opinion and Clerk's Memorandum mailed to counsel of record and the Clerk of the District Court at Raleigh, North Carolina. (wu)

Feb. 18 Judgment of the District Court affirmed. Judgment filed. (wu)

Feb. 27 Appellee's verified bill of cost filed. (foc)

Mar. 11 Certified copy of the judgment and printed copy of the opinion transmitted to the Clerk of the District Court at Raleigh, N. C. (jhl) (record returned 3/1/74)

May 28 Notice evidencing the filing petition for writ of certiorari in the Supreme Court May 19, 1975 filed. (No. 74-1452)(jhl)

Oct. 17 Certified copy of order of the Supreme Court granting certiorari October 6, 1975 filed. (jhl)

In the United States District Court for the Eastern District of North Carolina

Hospital Building Company, Plaintiff,

v.

Trustees of the Rex Hospital, a Corporation; Joseph Barnes; George Stockbridge; Richard Urquhart, Jr., Defendants.

Civil Action No. 4048

DOCKET ENTRIES

Date	Proceedings
1972	
Oct. 10	Fil. and ent. Cash Bond for Costs in amt. of $200.00. Fil. and ent. Complaint—Count I: Plff. prays that Court adjudge and decree that defts. have engaged in unlawful combination and conspiracy in vio. of Sec. 1 of Sherman Act (15 U.S.C.); that plff. recover 3 times damages determined to have been sustained, at least amt. of $2,401,956.00 and that joint and several judgments be entered against defts. for amts. determined; that ea. deft., their successors, etc. be enjoined and restrained from continuing, maintaining or renewing conspiracy etc. and that plff. recover costs w/reasonable attys.' fees. Count II: Plff. pray that Court adjudge and decree deft. Rex has engaged in unlawful attempt to monopolize and to conspire w/others to monopolize in vio. of Sec. 2 of Sherman Act; that plff. recover 3 times damages determined sustained, at least amt. of $2,401,956

and judgment be entered against deft Rex for amt. determined; that deft. Rex, its successors, etc. be enjoined and restrained from continuing to attempt to monopolize or conspire to do so; that plff. recover costs together w/reasonable attys.' fees. 4 cc to U.S.M.

Issued Summons and Complaint to U. S. Marshal—Orig. and 4 cc to U.S.M.

Oct. 17 Fil. and ent. U. S. Marshal's Return on Summons and Complaint: Theron A. Upchurch, Chairman of Be. of Trustees of Rex, served 10/11/72 at 2610 Wycliff Rd., Raleigh, NC. Joseph Barnes served 10/11/72 at Rex Hosp., corner of Wade Ave. and St. Mary's St., Raleigh, NC. George Stockbridge served by service upon his sect. Mrs. Nancy Dillinger, Home Security Bldg., Durham, N.C. Richard Urquhart, Jr. served by service upon his sect., Helen M. Howard, 4300 Six Forks Rd., Raleigh NC. Stockbridge and Urquhart served 10/11/72.

Oct. 30 Fil. and ent. Stipulation and Consent Order Extending Time within which defts. may respond to complaint to and including 11/30/72. (Jr Whitty, Clk., by JW Todd, Dpty) (Civ.O.B.No.24,P.8022) 1 cc to Thomas W. Steed, Jr.

Dec. 1 Fil. and ent. Stipulation and Consent Order Extending Time within which defts., may answer or otherwise plead to complaint to and including 12/30/72. (Dupree, J.) (Civ.O.B.No.25,P.8097) CC to counsel.

Dec. 29 Fil. and ent. Motion to Dismiss for Lack of Jurisdiction Pursuant to Rule 12(b)(1)(2) and for Failure to State a Claim Upon Which Relief Can Be Granted Pursuant to Rule 12(b)(6), by deft. George Stockbridge w/Cert. of Ser.

1973

Jan. 2 Fil. and ent. Motion to Dismiss Complaint for Lack of Requisite Effect Upon Interstate Commerce by defts. Trustees of the Rex Hospital, Joseph Barnes and Richard Urquhart, Jr.

Fil and ent. Memorandum in Support of Motion to Dismiss Complaint for Lack of Requisite Effect Upon Interstate Commerce w/Cert. of Ser. as to Motion and Memorandum.

Jan. 5 Fil. and ent. Certificate of Service as to Motion to Dismiss filed by defts., Rex Hospital, Joseph Barnes and Richard Urquhart, Jr.

Jan. 16 Fil. and ent. Brief in Support of Defendant Stockbridge's Motion to Dismiss Complaint Pursuant to Rule 12(b). w/Cert. of Ser.

Jan. 19 Set for hearing on Motion to Dismiss at Raleigh, 2:30 p.m., Thurs., 2/22/73. Cy. to counsel, Judges and Ct.Rptr.

Fil. and ent. Stipulation and Consent Order Extending Time within which plff. may file responsive brief, affidavit or other document in response to motions of defts. to dismiss action to and including 1/29/73. (Dupree, J.) (Civ.O.B.No.25,P.8254)

Jan. 19 Set for hearing on motion to dismiss at Raleigh, 2:30 P.M., 2/22/73 in Ctrm. No. 1. Cy. to counsel, Ct. Rptr., and Judges.

Jan. 29 Fil. and ent. Plaintiff's First Amendment to Complaint w/Cert. of Ser.

Fil. and ent. Brief in Opposition to Defendants' Motions to Dismiss for Lack of Jurisdiction w/Cert. of Ser.

Feb. 20 Fil. and ent. Amendment to Motion to Dismiss Complaint for Lack of Requisite Effect Upon Interstate Commerce w/Cert. of Ser.

Fil. and ent. Reply Brief in Support of Motion to Dismiss Complaint (with Amendment) for Lack of Requisite Effect Upon Interstate Commerce.

Feb. 28 Fil. and ent. Plaintiff's Supplemental Memorandum in Opposition to Motions to Dismiss w/Cert. of Ser.

Mar. 5 Fil. Defendants' Supplemental Brief Re Motion to Dismiss w/Cert. of Service attached, 1 copy. (Ent. 3/6/73)

Mar. 23 Fil. and ent: Order—that motions of defts. to dismiss for lack of subject matter jurisdiction and the failure of the complaint, as amended, to state a claim upon which relief can be granted are allowed and the action is dismissed. (Dupree, J.) (Civ.O.B.No.25,P. 8445) CC to Jordan, Steed, Mount and Anderson (Ent. 3/27/73)

Apr. 13 Fil. and ent. Notice of Appeal by plff. All counsel served and advised of rules governing appeals. Cy. to Ct. Rptr.

Fil. and ent. Bond for Costs on Appeal in amt. of $250.00—Maryland Cas. Co., Surety.

Apr. 23 Fil. and ent. Transcript of Motions heard before Hon. F. T. Dupree, Jr., at Raleigh, N.C., 2/22/73. (1-39 pgs.—Elizabeth Overby, Ct. Rptr.)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

COMPLAINT FOR DAMAGES AND EQUITABLE RELIEF

(Filed October 10, 1972)

Plaintiff, Hospital Building Company, a corporation organized under the laws of North Carolina, brings this civil action against defendants in order to recover damages sustained by plaintiff due to the actions of defendants and their co-conspirators as are more fully alleged hereinafter, which actions constitute (1) a combination and conspiracy in restraint of trade in violation of Section 1 of the Sherman Act and (2) an attempt to monopolize in violation of Section 2 of the Sherman Act, and to enjoin defendants and their co-conspirators from any further such action. For its complaint, plaintiff alleges:

COUNT I

Jurisdiction and Venue

1. Plaintiff brings this action under Section 4 of the Clayton Act (15 U.S.C. § 15) to recover treble the amount of damages incurred by plaintiff as a result of violations by the defendants of Sections 1 and 2 of the Sherman Act (15 U.S.C. § 1 and § 2) and under Section 16 of the Clayton Act (15 U.S.C. § 26) to secure equitable relief against a continuation of those violations. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1337.

2. The defendant corporation named in this complaint transacts business and has its home office in the Eastern District of North Carolina. The individual defendants reside in said District or elsewhere in the State of North Carolina. The unlawful activities done pursuant to the contracts, agreements, conspiracy and course of conduct herein alleged were and are carried out, in substantial part, within the Eastern District of North Carolina, and the interstate trade and commerce hereinafter described was and is carried on within the Eastern District of North Carolina. Venue as to each defendant is properly laid in the Eastern District of North Carolina pursuant to Section 4 of the Clayton Act (15 U.S.C. §§ 15, 22), 28 U.S.C. § 1391(b) and 1392(a).

Parties

3. Plaintiff, Hospital Building Company, is a corporation organized for profit under the laws of the State of North Carolina, with its principal office and place of business in Raleigh, North Carolina. Plaintiff operates Mary Elizabeth Hospital, located in Raleigh, North Carolina, a proprietary hospital offering general medical-surgical hospital services to the public. Plaintiff has been injured in its business and property by the contracts, agreements, conspiracy and course of conduct herein described and brings this action on its own behalf.

4. Defendant Trustees of Rex Hospital, a Corporation ("Rex"), is a corporate body organized pursuant to the laws of the State of North Carolina. Rex operates Rex Hospital, a private, tax exempt hospital which offers general medical-surgical hospital services to the public in Raleigh, North Carolina. The principal place of business of Rex is located in Raleigh, North Carolina.

5. Defendant Joseph Barnes is Administrator of Rex Hospital, and resides at 4821 Rembert Drive, Raleigh, North Carolina.

6. Defendant George Stockbridge is Executive Secretary of the Health Planning Council for Central North Carolina, and resides at 3912 Brickston Lane, Durham, North Carolina.

7. Defendant Richard Urquart is a member of the Board of Trustees of Rex and resides at 1021 Marlowe Road, Raleigh, North Carolina.

8. Various persons not made defendants herein have combined and conspired with the named defendants in the violations hereinafter alleged, and have performed acts and otherwise contributed to the furtherance thereof. Plaintiff names the following persons as co-conspirators, named herein as such but not as defendants. Plaintiff reserves the right, pursuant to the Federal Rules of Civil Procedure, to amend its complaint to add as defendants those persons named as co-conspirators herein and any other persons whose participation in the aforesaid combination and conspiracy is not presently known to plaintiff but whose participation becomes known to plaintiff at a later date. Other persons presently known by plaintiff to have participated in the combination and conspiracy are the following:

(a) Wake County Hospital System, Inc ("Wake"), an authority organized under the laws of the State of North Carolina and which operates Wake County Memorial Hospital in Raleigh, North Carolina;

(b) William F. Andrews, Sr. ("Andrews"), Executive Director of Wake, and Administrator of Wake County Memorial Hospital;

(c) Dr. I. B. Holley ("Holley"), a former chairman and presently a member of the Health Planning Council for Central North Carolina;

Definitions

9. As used in this complaint, the term "Raleigh area" means the area comprising Wake County, in the State of North Carolina.

10. As used in this complaint, the term "medical-surgical hospital" means a hospital staffed and equipped to handle patients in need of short-term medical treatment or surgery, and which offers surgical, X-ray, laboratory, nursing and various other services.

11. As used in this complaint, the term "paid hospital" means any medical-surgical hospital which charges any of its patients a fee or other charge for rendering services to such patient, regardless of whether some other patients are treated on a charitable basis. "Paid hospital business" means the business generated by payment of such fees by patients or third parties on their behalf.

Nature of Trade and Commerce

12. Medical-surgical hospitals play an essential role in providing medical and surgical care to persons in need of short-term medical treatment or surgery. Generally speaking, such hospitals are organized and established in one of three ways. "Proprietary" hospitals are owned and operated by private individuals or corporations in the same general manner as any other private business (giving due regard to the special functions served by a hospital), and are operated for profit. So-called "not-for-profit" hospitals are operated and established by private corporations usually organized under special state laws for non-profit corporations; while such corporations are not operated for profit in the sense that profits are distributed to any persons beyond the corporation, nevertheless, such corporations are dependent, for the most part, for their continued

existence upon earnings derived from the hospital's operation, and none of such earnings are remitted to federal and state governments as taxes. "Government" or "public" hospitals are typically established and operated by public or semi-public corporations organized under special state laws. Government hospitals are usually paid hospitals, insofar as some or all of their patients are concerned, but the payments received for a substantial number of such patients are from government programs. Hospitals of each of the three kinds compete with one another for paid hospital business in a community, regardless of their differing forms of organization.

13. Persons whose physical condition requires the services offered by medical-surgical hospitals, and who are able to arrange, directly or indirectly through a third party such as Blue Cross, a private insurance company, or a governmental program, for payment of fees for those services charged by paid hospitals, choose the hospital from which they will receive such services. The choice of such hospital is often governed by the identity of the physician who will be in charge of the person's care while hospitalized, but since most such physicians are on the staff of more than one hospital, there is, as a practical matter, open competition among paid hospitals regardless of form for the patronage of persons desiring medical-surgical services from hospitals. Thus, Hospital Building Company, through the operation of Mary Elizabeth Hospital, competes directly with Rex Hospital, Inc (Rex Hospital) and Wake County Hospital System, Inc. (Wake County Memorial Hospital) for the paid hospital business in the Raleigh area.

14. Hospital Building Company, in the course of its business of operating Mary Elizabeth Hospital, has purchased, and will continue to purchase in the future, a substantial amount of goods, including supplies and medicines from suppliers located in states other than North Carolina. Hospital Building Company regularly utilizes interstate communications including the mails,

telephone, telegraph, to carry on its business. A substantial number of persons coming to the Raleigh area for treatment in the medical-surgical hospitals there reside in states other than the State of North Carolina. Hospital Building Company, through Mary Elizabeth Hospital, competes for the paid hospital business of these persons. In the case of many patients at Mary Elizabeth Hospital, and at the other two paid hospitals in the Raleigh area, payment of the fees charged by the hospital is made by insurance companies and other providers located outside of the State of North Carolina. The combination and conspiracy complained of herein is directed, among other things, at plans of Hospital Building Company to relocate Mary Elizabeth Hospital into a new, enlarged hospital facility which would be constructed, in large measure, from goods and supplies purchased in states other than the State of North Carolina. Financing of the expansion at which the combination and conspiracy are aimed would be accomplished through arrangements with a lender located outside the State of North Carolina. The combination and conspiracy complained of herein thus has a substantial and direct effect on interstate commerce.

Offenses Alleged

15. Beginning at least as early as 1970, the exact date being unknown to plaintiff, and continuing thereafter up to and including the date of filing of this complaint, the defendants have, together with their co-conspirators in violation of Section 1 of the Sherman Act (15 U.S.C. § 1) engaged in an unlawful combination and conspiracy in unreasonable restraint of the aforesaid trade and commerce in the furnishing of medical-surgical hospital services and have maintained contracts and agreements in unreasonable restraint of such trade and commerce.

16. Said violations have consisted of continuing contracts, agreements, understandings, concert of action and course of

conduct among defendants and the co-conspirators to do, among other things, the following:

(a) fix, maintain and allocate the number of paid hospital beds in medical-surgical hospitals in the Raleigh area so that substantially all of said beds, and thus the capacity to offer medical-surgical hospital services would be artificially controlled by Rex and Wake, (i) in order to prevent plaintiff from serving the public need for such medical-surgical hospital beds, and (ii) in order that Rex and Wake could maintain the number of medical-surgical hospital beds in the Raleigh area at artificially low, non-competitive levels until such time as such defendants could increase the number of beds on a schedule suitable to them, with the result that said defendants could maintain and fix the price to patients of medical-surgical hospital services at artificially high, non-competitive levels;

(b) otherwise allocate customers and submarkets in such trade or commerce among themselves;

(c) foreclose the market for paid hospital business as against plaintiff and prevent plaintiff from competing for an expanded share of such market; and

(d) not compete in such trade or commerce.

17. The incidents of the conduct herein described include, among others including incidents not known to plaintiff at this time, the following:

(A) Rex and Wake caused to be formed in January, 1970, a purported public interest committee ("The Joint Long Range Hospital Planning Committee") to study and make recommendations concerning the provision of medical-surgical services by hospitals in the Raleigh area. In reality, the sole purpose of the aforesaid committee was to attempt to mask the combination and conspiracy already entered into among the defendants and co-conspirators whereby the market for paid hospital business

for medical-surgical hospitals would be allocated by and between Rex and Wake, to the exclusion of plaintiff. In furtherance of the aforesaid conspiracy, defendant Urquart was made a member of the aforesaid committee, and defendants Barnes and Stockbridge, and co-conspirator Andrews were made ex-officio members of the committee. Barnes, Stockbridge and Andrews played a significant and controlling role in preparation of the committee's report, which report endorsed the ultimate objective of the aforesaid conspiracy. Since its publication, the report has been utilized as a device to further the ends of the conspiracy. At all times, the defendants and co-conspirators intentionally concealed from the other members of the committee, who did not participate in the combination and conspiracy, the true purpose of the formation of the committee.

(B) Thereafter, upon enactment by the Legislature of the State of North Carolina of the "Certificate of Need Law" (Gen. Stat. § 90-291, N.C. Session Laws, Chapter 1164, ratified July 1, 1971), the defendants and co-conspirators caused the Health Planning Council for Central North Carolina to become a means for carrying out the above-described combination and conspiracy. The North Carolina Certificate of Need Law requires that, prior to the construction of any additional medical-surgical hospital beds, a Certificate of Need from the North Carolina Medical Care Commission be obtained by the party proposing to construct such medical-surgical hospital beds. The statute contemplates that the Medical Care Council will receive from a local agency "recommendations" respecting any request for such a certificate. Although such recommendations are not binding on the Commission, the ability of an applicant to obtain a fair hearing before the local agency on its request and to obtain a recommendation based on the merits of such request is important to an applicant both in terms of the possibility of ultimate success before the Medical Care Commission and in terms of the ability of the applicant speedily to process its application to the Medical Care Commission. It was the purpose and

intent of the defendants and co-conspirators that, as the agency empowered to make "recommendations," the Health Planning Council would act in accordance with the scheme of the defendants and co-conspirators to allocate the market and restrain competition as described above. It was at all times the intent of the defendants and co-conspirators to deny to plaintiff fair and effective access to the Health Planning Council, and to utilize the Council on behalf of the combination and conspiracy alleged herein to:

(1) defeat any application of plaintiff to the Medical Care Commission for a Certificate of Need approving construction of additional medical-surgical hospital beds by plaintiff,

(2) take all possible steps to secure for Rex and Wake Certificates of Need approving construction, from time to time according to the schedule of the conspiracy, of additional medical-surgical hospital beds for those hospitals at such time and in such amounts as would prevent and preclude plaintiff from constructing additional medical-surgical beds, and

(3) in the event the defendants and co-conspirators failed in denying plaintiff a Certificate of Need for the construction of additional medical-surgical hospital beds, then to take all steps necessary to prevent plaintiff from utilizing its Certificate of Need by whatever means possible, including baseless and unwarranted actions before courts, county and municipal authorities and other administrative agencies in the name of the Council.

As Executive Director of the Health Planning Council, defendant Stockbridge was the agent of the combination and conspiracy in utilizing the Health Planning Council for these purposes and defendant Stockbridge has in fact acted as the agent of the conspiracy in denying plaintiff effective access to the Health Planning Council and in causing the Health Planning Council to take the steps alleged herein in furtherance of the

combination and conspiracy. Co-conspirator Holley acted with Stockbridge in causing the Council to take the actions alleged herein in furtherance of the combination and conspiracy, with full knowledge of the ends of the combination and conspiracy and with malicious intent to damage plaintiff.

(C) Pursuant to North Carolina law, plaintiff, on November 4, 1971, presented its application for the construction of 91 additional medical-surgical beds (which beds would be constructed in addition to plaintiff's existing number of beds in a relocated hospital facility) in the Raleigh area to the Medical Care Commission for consideration and a copy of the application was sent to the Health Planning Council for review. Defendant Stockbridge, acting as agent of the combination and conspiracy, thereupon undertook a series of actions designed to, and which had the effect of, denying plaintiff fair access to the deliberations of the Health Planning Council and with the further goal of denying plaintiff fair access to the deliberations of the North Carolina Medical Care Commission. Although defendant Stockbridge well knew that he and the other defendants and co-conspirators named in this paragraph would cause the Health Planning Council to recommend rejection of plaintiff's application, defendant Stockbridge represented that plaintiff could receive a fair hearing before the Council. Plaintiff undertook to comply with each and every procedural demand made upon it by defendant Stockbridge, allegedly on behalf of the Council (even though the Health Planning Council had no formal procedural standards), which procedural demands were made solely to harass and frustrate plaintiff. Defendant Stockbridge, as agent of the combination and conspiracy and with the active, though unrevealed, assistance of Rex and defendant Barnes, and co-conspirator Holley, purported to establish various substantive standards which he pretended plaintiff should agree to meet if its application were to receive a favorable recommendation by the Health Planning Council, even though

defendant Stockbridge, and defendants Rex and Barnes well knew that the purported standards had no basis in law (and, in fact, plaintiff's agreement to several of them would have constituted violations of the laws of North Carolina and of the United States). Defendant Stockbridge and the other defendants and co-conspirators named in this paragraph knew at all times that they would cause the Health Planning Council to recommend that plaintiff's application be denied. Plaintiff was never allowed to raise before the Health Planning Council the legality or relevance of the purported "standards," was not given the chance to make a presentation of its case to the Health Planning Council, nor was plaintiff allowed to cross-examine or otherwise investigate the accuracy of the opposition filed by defendant Rex and co-conspirator Wake to plaintiff's application. For these and other reasons, plaintiff was completely denied a fair hearing by the Health Planning Council and thus completely denied fair access to that body and a chance to have its application considered on the merits. As a direct result of the conspiracy, therefore, the Health Planning Council subsequently recommended to the North Carolina Medical Care Commission that plaintiff's application be denied. Such unfounded adverse recommendation was intended to, and did, delay and forestall the capacity of plaintiff to compete effectively in the Raleigh area.

(D) On February 22, 1972, the North Carolina Medical Care Commission, through its duly authorized hearing examiner, held a hearing on the application of plaintiff for the construction of 91 additional medical-surgical beds in the Raleigh area. (The State of North Carolina estimates that an additional 409 medical-surgical beds are needed in the Raleigh area.) Plaintiff appeared and presented its case. The Health Planning Council appeared in opposition to plaintiff's application, nominally on its own behalf, but in reality on behalf of the combination and conspiracy.

(E) After the February 22 hearing, the defendants and co-conspirators took further steps designed to prevent plaintiff from effective access to the procedures and deliberations of the Medical Care Commission, and to delay processing of plaintiff's application for Certificate of Need to the damage of plaintiff, as follows:

(i) Defendant Rex, even though it was present at the hearing and had an opportunity to participate therein, did not appear formally at the hearing but later demanded to appear as a protestant of record and become a formal party to the proceedings, for the sole purpose of preventing and delaying approval of plaintiff's application by the Medical Care Commission.

(ii) Defendant Rex thereafter sought, by letter to the Medical Care Commission, in bad faith further to delay the processing and approval of plaintiff's application.

(iii) Even though it had had full and fair opportunity to present such evidence as it might have deemed appropriate at the February 22 hearing, the Health Planning Council in bad faith requested a rehearing on plaintiff's application.

(iv) In a bad faith attempt to delay action of the Medical Care Commission, co-conspirator Wake, though it had formally withdrawn as a party on April 4, 1972, in June, 1972, in order to further the combination and conspiracy, requested that it be made a party of record solely to ask for a further delay of then scheduled further hearings.

(v) As a result of the bad faith actions of the Health Planning Council, further hearings were held on June 12, 1972, by the duly authorized hearing examiner on the North Carolina Medical Care Commission. At that time, the Health Planning Council and defendant Rex introduced further purported evidence, in a baseless attempt to oppose the application of plaintiff. As was well known to both the Health Planning Council and to Rex, the evidence submitted was without probative value and

was submitted solely for the purpose of denying plaintiff effective access to the procedures and deliberations of the Medical Care Commission and to delay the approval of plaintiff's application, to the damage of plaintiff. At the June 12, 1972, hearing, though the same was nominally in response to the request of the Health Planning Council to hear further evidence in support of the Health Planning Council's recommendation, attorneys for Rex appeared and introduced the purported evidence in the name of the Health Planning Council. At least one witness called to testify, though nominally called on behalf of the Health Planning Council, admitted on cross-examination that the expenses of his firm were being paid by Rex.

(vi) In spite of the grant by the Medical Care Commission of the additional hearing described above, defendant Stockbridge, on June 22, 1972, sought further delay on a final decision by the North Carolina Medical Care Commission which decision, on the basis of the record established on February 22, 1972, and June 12, 1972, could only be favorable to the plaintiff.

(F) Notwithstanding the illegal efforts in furtherance of the conspiracy by the defendants and co-conspirators to deny plaintiff a fair and effective access to the North Carolina Medical Care Commission, that Commission, on the basis of the record established at its hearings and in accordance with North Carolina law, granted to plaintiff on June 30, 1972, a Certificate of Need approving construction of an additional 91 medical-surgical hospital beds in the Raleigh area. At this point, even though plaintiff had suffered substantial damages as a result of the unwarranted and baseless opposition to its application for a Certificate of Need by the combination and conspiracy, plaintiff was prepared to move forward with its construction of such additional medical-surgical hospital beds in order to serve the needs of the public in the Raleigh area. In reliance upon its known compliance with the North Carolina law, and later in specific reliance upon the Certificate of Need issued by the

Medical Care Commission pursuant to the North Carolina laws, plaintiff had as of June 30, 1972, caused to be expended substantial sums of money and the time of its personnel in planning and arranging for the construction of the additional medical-surgical hospital beds contemplated by its application to the Medical Care Commission.

(G) However, since the issuance of the aforesaid Certificate of Need to plaintiff, the defendants and co-conspirators have continued their combination and conspiracy and have taken further steps to effect the goals of that conspiracy and will continue to take such steps unless restrained by this Court.

(H) On or about May 4, 1972, Rex, in accordance with the terms of the combination and conspiracy as revealed in the report of the purported "Joint Long Range Planning Committee" filed for a Certificate of Need covering the construction of an additional 109 medical-surgical hospital beds. The Health Planning Council received this application on May 4, 1972. No hearings were ever held by the Health Planning Council of which plaintiff had notice on the said application of Rex. Upon information and belief, Rex was not required to present evidence to the Health Planning Council in response to the purported substantive and procedural standards purportedly applied to the application of plaintiff. Rather, in furtherance of the conspiracy, the application of Rex was given expedited treatment and the Health Planning Council thereafter, at a time unknown to plaintiff, forwarded to the North Carolina Medical Care Commission a recommendation that the application of Rex be approved. Subsequent to the filing by plaintiff of its application to the North Carolina Medical Care Commission, that Commission had amended its procedures to provide for approval of an application for a Certificate of Need without hearing where such application was not "apparently contested" and on July 20, 1972, the Medical Care Commission issued to Rex a Certificate of Need.

(I) In addition, and in furtherance of the goals of the combination and conspiracy, on July 28, 1972, the Health Planning Council filed in the Superior Court of Wake County an appeal from the decision of the Medical Care Commission granting to plaintiff a Certificate of Need. This purported action is without basis in law or in fact, and is filed in bad faith solely for the purpose of harassing and damaging plaintiff and to prevent plaintiff from proceeding pursuant to the Certificate of Need granted by the Medical Care Commission to construct the additional medical-surgical hospital beds authorized by that certificate. Although the defendants and co-conspirators well know that the grant of the Certificate of Need to plaintiff by the Medical Care Commission is authorized, and indeed required, by North Carolina law and by the facts adduced at the hearings before the Medical Care Commission, they have caused the Health Planning Council through defendant Stockbridge as their agent to file this baseless appeal. The purported appeal is nothing more than a continued incident and an overt manifestation of the combination and conspiracy alleged herein.

(J) It is the obvious intention of the defendants and co-conspirators to maintain their combination and conspiracy, and to continue to take other actions pursuant thereto, designed to accomplish the goals of the conspiracy and to prevent plaintiff from constructing medical-surgical beds which it is entitled to construct pursuant to the Certificate of Need duly issued to plaintiff by the North Carolina Medical Care Commission.

(K) Throughout the duration of the combination and conspiracy referred to herein, the defendants and co-conspirators have attempted to further the goals of the said combination and conspiracy by continued joint efforts to create publicity adverse to plaintiff and by seeking to influence both the public and various private persons and organizations to accede to the goals of the conspiracy by publishing false and malicious information concerning plaintiff and the public need for the

medical-surgical hospital beds proposed to be constructed by plaintiff. In addition, the defendants and co-conspirators have issued misleading publicity concerning both the intentions and the ability of Rex and Wake to meet the clear and pressing needs of the Raleigh area for additional medical-surgical beds. The defendants and co-conspirators are well aware that plaintiff is ready, willing and able to provide additional medical-surgical beds for the Raleigh area, while defendant Rex and co-conspirator Wake are unable to supply medical-surgical beds as quickly as can plaintiff, and well know that plaintiff will supply such medical-surgical hospital beds at no cost to the public for their construction. Nevertheless, defendant Rex and co-conspirator Wake have arranged for misleading publicity to the effect that they were prepared to construct such additional medical-surgical beds in the near future. The sole purpose of the public and private communications of the defendants and co-conspirators concerning plaintiff is maliciously to damage plaintiff in furtherance of the combination and conspiracy, and the sole purpose of the misleading publicity concerning the purported undertakings of Rex and Wake has been to further the goals of the combination and conspiracy alleged herein, and to irreparably damage plaintiff.

(L) The acts described in this paragraph do not constitute all of the incidents of the combination and conspiracy. Certain incidents have been willfully concealed by the defendants and co-conspirators. Plaintiff reserves the right to prove at trial all of the incidents of the combination or conspiracy, whether or not alleged herein.

Effects

18. The effects of the aforesaid combination and conspiracy have been, are, and will be, among others, to prevent and restrain competition in the furnishing of additional medical-

surgical hospital services to the public with the consequences that (1) the public need for such additional medical-surgical beds will not be met, (2) due to a continuing shortage of medical-surgical beds, the fees charged to the public will be maintained at artificial and non-competitive levels, and (3) there will be a substantial adverse effect on the interstate commerce described herein.

19. Plaintiff has been prevented from proceeding with construction of the additional medical-surgical hospital beds long ago announced and planned for by plaintiff, and now authorized by the Certificate duly issued to plaintiff by the North Carolina Medical Care Commission.

20. Plaintiff has expended, and will continue to have to expend substantial sums of money in order to implement its construction of additional medical-surgical hospital beds and, in particular, to resist the bad faith actions by defendants and their co-conspirators designed to effect the goals of the combination and conspiracy, that is, to foreclose the market for medical-surgical hospital services in the Raleigh area to plaintiff and to allocate the same between Rex and Wake (and, to a limited extent which does not affect the allegations of this complaint, among smaller existing facilities).

Damages

21. As a result of the aforesaid combination and conspiracy, plaintiff has expended considerable sums of money which it would not have otherwise been required to spend due to the necessity of overcoming the illegal attempts of the defendants and co-conspirators to deny plaintiff fair access to the Medical Care Commission.

22. Plaintiff has incurred significant direct costs as a result of the delay caused purposely by the defendants and co-con-

spirators in furtherance of the aforesaid combination and conspiracy.

23. Plaintiff has incurred and will incur a loss of revenues that plaintiff could reasonably have anticipated if construction of its additional medical-surgical hospital beds had not been illegally delayed.

24. Plaintiff is unable at this time to state finally the amount of damages sustained and to be sustained by reason of the illegal acts of defendants and their co-conspirators set forth herein. Plaintiff shows that, but for the illegal combination and conspiracy alleged herein, plaintiff would have received its certificate and begun construction of its additional beds at least by March 1, 1972. Plaintiff's best estimate is that, as a result of the delay caused by the illegal combination and conspiracy alleged herein, plaintiff has, as of the date of filing of this lawsuit, suffered damages in the amount of at least $800,652.00.

COUNT II

1. Plaintiff re-alleges and incorporates hereby by reference paragraphs 1 through 24 hereinabove except that, as to Count II, plaintiff names only Rex as defendant.

2. Plaintiff alleges that paid hospital business conducted by non-public hospitals constitutes a separate and distinct line of commerce.

3. All of the acts and incidents set forth in Count I were undertaken at the instigation, and under the direction and control of defendant Rex. Such acts constitute an attempt by defendant Rex to monopolize, and to conspire, with those other persons named as defendants and co-conspirators in Count I, to attempt to monopolize, the paid hospital business conducted by non-public hospitals in the Raleigh area, in violation of Section 2 of the Sherman Act (15 U.S.C. § 2).

PRAYER

Wherefore, plaintiff prays:

As to Count I

1. That the Court adjudge and decree that the defendants have engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

2. That plaintiff recover three times the damages determined to have been sustained, that is, at least the amount of $2,401,956, and that joint and several judgments be entered herein against the defendants for the amounts determined.

3. That each of the defendants, their successors, assigns, subsidiaries and transferees, and the respective officers, directors, agents and employees, and all other persons acting or claiming to act on behalf thereof, or in concert therewith be perpetually enjoined and restrained from in any manner, directly or indirectly, continuing, maintaining or renewing the aforesaid conspiracy, and from adopting or following any practice, plan, program or design having a similar purpose or effect.

4. That this Court grant such other, further and different relief as may be deemed just and proper.

5. That plaintiff recover the costs of this suit together with reasonable attorneys' fees.

As to Count II

1. That the Court adjudge and decree that defendant Rex has engaged in an unlawful attempt to monopolize, and to conspire with others to monopolize, in violation of Section 2 of the Sherman Act (15 U.S.C. § 2).

2. That plaintiff recover three times the damages determined to have been sustained, that is, at least the amount of $2,401,956, and that judgment be entered against defendant Rex for the amount determined.

3. That defendant Rex, its successors, assigns, subsidiaries and transferees, and its officers, trustees, agents and employees, and all other persons acting or claiming to act on its behalf or in concert with it be perpetually enjoined and restrained from in any way continuing the said attempt to monopolize, or to conspire to do so.

4. That this Court grant such other, further and different relief as may be deemed just and proper.

5. That plaintiff recover the costs of this suit together with reasonable attorneys' fees.

JOHN R. JORDAN, JR.

Of Counsel:

JORDAN, MORRIS and HOKE
Post Office Box 709
Raleigh, North Carolina 27602
Telephone: (919) 828-2501

JOHN K. TRAIN, III
ROBERT W. MILLER

Of Counsel:

ALSTON, MILLER & GAINES
12th Floor, C&S Bank Building
Atlanta, Georgia 30303
Telephone: (404) 577-8600

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

(Title Omitted in Printing)

MOTION
To Dismiss for Lack of Jurisdiction Pursuant to Rule 12(b) (1) (2) and for Failure to State a Claim Upon Which Relief Can Be Granted Pursuant to Rule 12(b) (6)

(Filed December 29, 1972)

Now comes the Defendant, George Stockbridge, and respectfully moves that the complaint in this cause be dismissed pursuant to Rule 12(b) of the Rules of Civil Procedure and respectfully shows unto the Court as follows:

Motion to Dismiss for Lack of Jurisdiction

1. The Defendant, George Stockbridge, respectfully contends that the complaint in this cause be dismissed pursuant to Rule 12(b) (1) and (2) in that this Court lacks jurisdiction over the subject matter and person.

2. This action was instituted by the plaintiff pursuant to Section 4 of the Clayton Act, Title 15 U. S. C., Section 15, for alleged violations of the anti-trust provisions under the Sherman Act and Clayton Act.

3. The United States District Court has exclusive jurisdiction of violations under the anti-trust laws; provided, however, to maintain said action under Title 15 U. S. C., Section 15 (Clayton Act, Section 4), the alleged acts complained of must re-

strict the flow of interstate commerce and adversely affect interstate commerce.

4. The acts as alleged by the plaintiff fail to meet the jurisdictional requirement in that the same do not directly, substantially, and adversely affect interstate commerce.

Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted

1. The Defendant, George Stockbridge, respectfully contends that the complaint in this cause fails to state a claim upon which relief can be granted and the same should be dismissed pursuant to Rule 12(b) (6).

2. The Defendant, George Stockbridge, further shows unto the Court:

a. The acts as alleged in the complaint do not constitute violations under Sections 1 and 2 of the Sherman Act (15 U. S. C., § 1 and 32) and under Section 16 of the Clayton Act (15 U. S. C. § 26).

b. The plaintiff filed its application for a certificate of need for medical care facilities with Health Planning Council of Region "J", pursuant to Article 21 of the North Carolina General Statutes. The Defendant, George Stockbridge, has been the Executive Secretary of Health Planning Council and was at all times acting in this capacity and in accordance with the policy of the Board of Directors of Health Planning Council Region "J."

Wherefore, the Defendant, George Stockbridge, Prays the Court that this action be dismissed on the grounds that the Court lacks jurisdiction over the subject matter and person and

that the plaintiff has failed to state a claim upon which relief can be granted.

Respectfully submitted this 29th day of December, 1972.

HOFLER, MOUNT, WHITE & LONG
By LILLARD H. MOUNT
Attorney at Law
P. O. Box 3871
Durham, North Carolina 27702
919-682-5606

ROBERT MORGAN
Attorney General
By (MRS.) CHRISTINE Y. DENSON
Assistant Attorney General
N. C. Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

(Title Omitted in Printing)

MOTION TO DISMISS COMPLAINT FOR LACK OF REQUISITE EFFECT UPON INTERSTATE COMMERCE

(Filed January 2, 1973)

Pursuant to Rule 12(b)(1) and (6), Federal Rules of Civil Procedure, defendants Trustees of the Rex Hospital ("Rex Hos-

pital"), Joseph Barnes, its Administrator, and Richard Urquhart, Jr., a trustee of Rex Hospital, move for an order dismissing this action for failure to allege facts sufficient to state the requisite effect upon interstate commerce as required under the Sherman Act, Sections 1 and 2, 15 U.S.C. §§ 1 and 2. In order to obtain jurisdiction under the Sherman Act, plaintiff must allege facts sufficient to show that the conspiracy and other restraints complained of affected the flow of interstate commerce in a direct and substantial way. This plaintiff has not done. Rather, the complaint alleges facts which at most describe a situation purely local and intrastate in dimension, with only incidental and remote effect on interstate commerce. The prevailing case law is legion that such an alleged fact situation is nowhere near sufficient to state a claim under the Sherman Act. This is particularly true in the area of hospital services.

We hasten to point out to the Court the highly questionable nature of the cause of action alleged by plaintiff and the distinct possibility of summary judgment in favor of defendants on the merits of the claim. Only this year the Supreme Court of the United States has reaffirmed the right of groups, free from the antitrust laws, to "use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972). However, at this juncture we believe the first question for Court determination should be the interstate commerce issue. If that issue disposes of the litigation, and we believe it will, there will be no need to become involved in other dispositive questions.

The accompanying memorandum of law sets forth the pertinent case law, which is believed to be highly compelling in support of this motion to dismiss. For the purposes of this motion, Rex Hospital, Barnes and Urquhart will accept the jurisdictional allegations of the complaint as true (para. 14).

For the foregoing reasons and those set forth in the accompanying memorandum, the Court is urged to grant this motion and dismiss the complaint. Oral argument is requested.

Respectfully submitted

THOMAS W. STEED, JR.
ALLEN, STEED & PULLEN
P.O. Box 2058
Raleigh, North Carolina 27602
919/828-4481

JOHN H. ANDERSON
SMITH, ANDERSON, BLOUNT & MITCHELL
P.O. Box 750
Raleigh, North Carolina 27602
919/832-6463

RAY S. BOLZE
HOWREY, SIMON, BAKER & MURCHISON
1730 Pennsylvania Avenue, N. W.
Washington, D. C. 20006
202/872-8800

Attorneys for Rex Hospital; Joseph Barnes; Richard Urquhart, Jr.

Dated: December 28, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

(Title omitted in printing)

PLAINTIFF'S FIRST AMENDMENT TO COMPLAINT

(Filed January 29, 1973)

Plaintiff hereby amends its Complaint as follows:

1

Plaintiff amends paragraph 14 of its Complaint by striking therefrom said paragraph and inserting in lieu thereof a new paragraph 14 to read as follows:

"14

a

Hospital Building Company is a wholly-owned subsidiary of Charter Medical Corporation ("Charter"), a Delaware corporation with offices and principal place of business in Macon, Georgia. Charter owns, directly or indirectly, and operates nine medical-surgical hospitals (in addition to Mary Elizabeth) located in the States of Georgia, Virginia, Louisiana and Nevada. Charter manages medical-surgical hospitals in the States of Georgia, Texas and Virginia, and in Puerto Rico. Charter purchased all of the outstanding stock of Hospital Building Company in December, 1970, with the intention of causing the relocation and expansion of Mary Elizabeth Hospital as set forth herein.

b

Hospital Building Company, in the course of its business of operating Mary Elizabeth Hospital, has purchased on a regular and continuing basis, and will continue so to purchase in the future, substantial amounts of goods including supplies and medicines, from vendors in states other than North Carolina. Approximately eighty percent (80%) of the goods purchased by Hospital Building Company are purchased pursuant to national contracts negotiated by Charter with vendors, which contracts establish the terms of purchase for Charter's various operations. In 1972 (excluding food and other goods for its kitchen operation) Hospital Building Company purchased supplies in the amount of $112,846, including supplies for its radiology operation ($29,000), medical laboratory ($23,000), electrocardiology operation ($26,000) and pharmacy ($33,-000). When Mary Elizabeth Hospital is relocated and expanded, such purchases will continue and increase substantially.

c

Hospital Building Company regularly utilizes interstate communications, including the mails, telephone and telegraph to carry on its business. Hospital Building Company and Charter have entered into a management agreement whereby Charter provides to Hospital Building Company various management services in return for payment of a fee to it by Hospital Building Company. The amount of such fee is based upon the gross revenues of Hospital Building Company. During the 1972 fiscal year, such fee was approximately $36,000. When Mary Elizabeth Hospital is relocated and expanded, the amount of such fee will increase substantially.

d

Because of its location and other factors, a substantial number of persons regularly come from states other than North Carolina to the Raleigh area for treatment in medical-surgical hospitals there. Hospital Building Company competes for the paid hospital business of such persons.

e

In the case of many patients at Mary Elizabeth Hospital, and at the other two paid hospitals in the Raleigh area, payment of the fees charged patients by the hospitals for goods and services, is regularly made by insurance companies and other providers located outside the State of North Carolina. A substantial number of patients at Mary Elizabeth Hospital are covered by federal programs, including Medicare and Medicaid, providing for payment in whole or in part of some or all of the charges made to them for goods and services by Mary Elizabeth Hospital. In its 1972 fiscal year, charges for goods and services provided patients by Mary Elizabeth Hospital were made to the following sources of payment and payment received from them in whole or in part:

Source	% of Total Charges
1. Private insurance programs (including Blue Cross)	56.1%
2. Medicare	36.3%
3. Medicaid	2.1%
4. Direct to patient	5.5%

f

The combination and conspiracy complained of herein is directed, among other things, at plans of Hospital Building Company and Charter to relocate Mary Elizabeth Hospital into a new, enlarged hospital facility and expand its capacity from 49 patient beds to approximately 149 patient beds. The cost of such relocation and expansion is estimated to be in excess of $4,000,000. Financing of these costs will be accomplished through one or more loans with one or more lenders located outside the State of North Carolina. Repayment of 'permanent' financing will extend substantially into the future, requiring regular remittances by Hospital Building Company to a lender outside the State of North Carolina and various activities by such lender in North Carolina during such period of time. The new hospital facility will be constructed, in large measure, from goods, supplies and materials which have moved in interstate commerce, and by persons engaged in interstate commerce.

g

Mary Elizabeth Hospital is accredited by the Joint Commission on Accreditation of Hospitals, a national organization which promulgates standards for the operation of hospitals.

In its operation of Mary Elizabeth Hospital, Hospital Building Company is doing business in interstate commerce. The combination and conspiracy complained of herein has a substantial and direct effect on interstate commerce."

This 29 day of January, 1973.

Respectfully submitted

John R. Jordan, Jr.
John K. Train, III
Robert W. Miller
Timothy S. Perry
Attorneys for Plaintiff

Of Counsel

Jordan, Morris and Hoke
Post Office Box 709
Raleigh, North Carolina 27602
(919) 828-2501

Of Counsel

Alston, Miller & Gaines
1200 Citizens and Southern
National Bank Building
Atlanta, Georgia 30303
(404) 577-8600

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

AMENDMENT TO MOTION TO DISMISS COMPLAINT FOR LACK OF REQUISITE EFFECT UPON INTERSTATE COMMERCE

(Filed February 20, 1973)

Defendants, Trustees of Rex Hospital, Joseph Barnes, and Richard Urquhart, Jr., hereby amend their motion to dismiss the complaint which was served December 28, 1972 so as to include within the scope of such motion plaintiff's "First Amendment to Complaint." Based upon the arguments set forth in defendants' Supporting Memorandum served December 28, 1972 and Reply Brief served this date, as well as the reasons stated in our initial Motion to Dismiss, these defendants hereby move that the Court enter an order pursuant to Rule 12(b)(1) and (6), Federal Rules of Civil Procedure, dismissing the complaint and amendment to complaint filed herein for failure to allege facts sufficient to state the requisite effect upon interstate commerce, as required under the Sherman Act, Sections 1 and 2, 15 U.S.C. §§ 1 and 2.

Respectfully submitted

THOMAS W. STEED, JR.
ALLEN, STEED & PULLEN
Post Office Box 2058
Raleigh, North Carolina 27602
919/828-4481

JOHN H. ANDERSON
SMITH, ANDERSON, BLOUNT & MITCHELL
Post Office Box 750
Raleigh, North Carolina 27602
919/832-6463

RAY S. BOLZE
HOWREY, SIMON, BAKER & MURCHISON
1730 Pennsylvania Avenue, N.W.
Washington, D. C. 20006
202/872-8800

Attorneys for Rex Hospital; Joseph Barnes; Richard Urquhart, Jr.

Dated: February 17, 1973

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA RALEIGH DIVISION

(Title omitted in printing)

BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF JURISDICTION

(Filed January 29, 1973)

• • • • • • •

[7] II. *Agreement and Citation of Authority*

A. *Summary Treatment by Motion Is Not an Appropriate Means for Determining the "Commerce" Question.*

At the outset, Plaintiff points out that Defendants' attempt to deal with the "interstate commerce" issue by a 12(b)(6) motion is not appropriate. The courts have consistently held that summary treatment (by motion or otherwise) of substantive issues in antitrust cases is improper.

• • • • • • • •

[8] Courts have been particularly reluctant to grant dismissal of antitrust cases on motions directed at the Complaint's allegations of the requisite effect on interstate commerce . . .

• • • • • • • •

The Defendants' motions to dismiss should therefore be denied, if only because they raise questions of fact, not questions of law which could be resolved on the Complaint as it stood when the motions were filed. Plaintiff submits, however, that the motions must be denied when considered in light of the amended Complaint because as a matter of law, there is sufficient impact of the combination and conspiracy alleged on interstate commerce.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

(Title omitted in printing)

**MOTIONS HEARD BEFORE HONORABLE
FRANKLIN T. DUPREE, JR.,
U. S. DISTRICT JUDGE**

Appearances:

For Plaintiff: Timothy S. Perry, Esq., John K. Train, III, Esq., Charles B. Morris, Jr., Esq.

For Defendants: Ray S. Bolze, Esq., John H. Anderson, Jr., Esq., Thomas W. Steed, Jr., Esq., L. H. Mount, Esq., Christine Y. Denson, Esq.

At Raleigh

Feb. 22, 1973

* * * * * * *

[28] The cases he cites refer to fortuitous contacts or fortuitous effects. I do not believe that your Honor will find in the allegations we have made in the amended complaint anything that is fortuitous or incidental or otherwise than part of the regular and continuing course of business conducted by this plaintiff. This plaintiff regularly purchases supplies to run its business. A hospital does not just consist of physicians coming in and treating patients. A hospital is perhaps thought of to some extent in the nature of a hotel or motel. Such institutions have been held to be in interstate commerce. Restraints against them have been held to adversely affect interstate commerce for purposes of application of the Sherman Act. When a doctor comes to the hospital, he comes to use equipment,

he comes to prescribe and give medicines, he comes to look at patients and take care of them who are in beds that have all been purchased, as alleged here by this plaintiff, in the regular course of its business from interstate commerce sources. **[29]** The Court: Do you believe that a business can be engaged in interstate commerce and yet be restrained in some aspect of its business which is not interstate commerce and therefore not have available to it the provisions of the Sherman Act?

Mr. Train: I would think so, your Honor. I think Mr. Bolze description of his activities this morning with respect to the local restaurant; perhaps he stated it a little bit too baldly; I'm sure it will come as a surprise to most public restaurants to find that they're not in interstate commerce for the purpose of some acts of the federal legislation.

The Court: I know they are. You find that out in the civil rights aspect of that litigation.

Mr. Train: That's entirely correct. But I could conceive of local businesses who for one reason or another would be subject to federal regulation in one form or another——

The Court: Well, more specifically, here now, when you are buying your supplies and your X-ray equipment and so forth from out of state **[30]** you are to some extent engaging in interstate commerce, but when you get all of that equipment, material and supplies assembled, then you provide a service for a local person; is that interstate commerce?

Mr. Train: We feel both that that is interstate commerce and we also feel that whether or not that is interstate commerce as such, that where there is a conspiracy that prevents us from providing those services, that there is certainly a substantial adverse effect on interstate commerce.

The Court: But what you complain of here is not the actual commerce with some out of state supplier or lender or

patient or something but your ability to expand an existing business, triple it I believe you say, in order to provide more services, and it is that thwarting of your intention and your desire to expand your business that has been the subject of their alleged restraint, is it not?

Mr. Train: That's correct.

* * * * * * * *

[34] * * * is correct, then the antitrust laws could never remedy a conspiracy aimed at the entry of a new competitor into the market, which I believe is one of the things the antitrust laws are certainly designed to expedite.

So, we believe that this case, looked at with respect to the particular facts alleged—and we realize that we will be put to the proof of these facts as we go down the road, and of course, jurisdiction as a question could be raised at any time. But we feel that based on the facts we've alleged in this particular case that we come within the cases discussing the requisite involvement of interstate commerce, so as to properly invoke the jurisdiction of the federal court under the Sherman Act.

The Court: Thank you, Mr. Train. Would you like to reply to that, Mr. Bolze?

Mr. Bolze: Yes, sir, briefly, your Honor.

First, as to the comments of Mr. Train, he said the matters that they would plan to prove on trial, to show the requisite effect upon interstate commerce are as alleged **[35]** in the amended complaint, and that they could prove those facts. Well, that's exactly our point in moving for dismissal on the pleadings. That is our understanding; that they have nothing additional to show. They've not come up with any allegations that we've restrained any interstate trade coming in.

The Court: I'm inclined to be with you on the argument of prematurity. I think it's just as good time as any to get this settled.

Mr. Bolze: I know my clients don't want to spend any more money than they have to in a case like this and we think a case like this can go on the pleadings.

The second point, your Honor, is the fact that it's interstate commerce because Mr. Train says the doctor comes in and treats a patient by using an X-ray machine which at one time or other was purchased through interstate trade or commerce. To me it's just incomprehensible; in that case every piece of equipment would be used in interstate commerce. I just cannot fathom that. That is just not in the cases. He says if he treats **[36]** a patient lying on a bed which came at one time through interstate commerce, that's in interstate commerce. I just cannot accept that. That puts everyone in interstate commerce.

The courts have said that is not the way the Sherman Act is to be used. It's to relate to matters in interstate commerce that would substantially affect it. Certainly, treating a patient lying on a bed that may have come by interstate manufacturer through a distributor, is not being in interstate commerce or that doctrine. The Supreme Court has so held and so have the courts of appeal.

Finally, your Honor, as to payments by Blue Cross and Medicaid and Medicare, the allegations they have and the substantial dollar amounts, Blue Cross and Blue Shield are state, not across state lines, these are state agencies, Medicare, Medicaid are paid from the state agencies; they may be indirectly funded by the federal government, but if you take that approach, as counsel here suggested to me, our greenbacks are * * *

* * * * * * * *

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Hospital Building Company,
Plaintiff,
vs.
Trustees of the Rex Hospital, a Corporation; Joseph Barnes; George Stockbridge; Richard Urquhart, Jr.,
Defendants.
Civil No. 4048

ORDER

(Filed March 23, 1973)

The plaintiff, a North Carolina corporation, which operates a private hospital for profit in the City of Raleigh, has brought this civil antitrust action against the defendant Rex Hospital, also located in Raleigh, the defendant, Joseph Barnes, its administrator, and Richard Urquhart, Jr., one of its trustees. The defendant, George Stockbridge, is executive secretary of the Health Planning Council for central North Carolina. Jurisdiction has been invoked under the Sherman Act, 15 U.S.C. §§ 1 and 2. Alleging violations of these statutes, the complaint charges defendants, and certain other named "co-conspirators" not made parties to the action, with having "engaged in an unlawful combination and conspiracy in unreasonable restraint of . . . trade and commerce in the furnishing of medical-surgical hospital services" and "an attempt by defendant Rex to monopolize, and to conspire . . . to attempt to monopolize, the paid hospital business conducted by non-public hospitals in the Raleigh area . . ." The case is before the court on the motions

of the defendants to dismiss for lack of subject matter jurisdiction and the failure of the complaint, as amended, to state a claim upon which relief can be granted.

Central to defendants' motions is the contention that the facts alleged by plaintiff do not show that the alleged wrongdoing on the part of defendants has affected interstate commerce in a direct and substantial way necessary to invoke the provisions of the Sherman Act. To meet the challenge of these motions the plaintiff filed an amendment to its complaint alleging with more specificity the scope of its activities in interstate commerce which the alleged wrongdoing of defendants is affecting. The allegations of the amendment to the complaint may be briefly summarized as follows:

1. Plaintiff is the wholly-owned subsidiary of a Delaware corporation which owns, directly or indirectly, and operates or manages medical-surgical hospitals in five states and Puerto Rico.

2. Plaintiff purchases on a regular and continuing basis substantial amounts of goods, supplies and medicines from vendors in states other than North Carolina.

3. Plaintiff regularly utilizes interstate communications, including the mails, telephone and telegraph to carry on its business.

4. A substantial number of persons regularly come from states other than North Carolina to the Raleigh area for treatment in medical-surgical hospitals.

5. Plaintiff receives a substantial part of its revenue from medicare, medicaid and hospital insurance benefits from insurance companies located outside North Carolina.

6. The planned expansion of plaintiff's present facilities will cost in excess of four million dollars which will be fi-

nanced through one or more lenders located outside North Carolina.

7. Plaintiff's present hospital is accredited by the Joint Commission on Accreditation of Hospitals,. a national organization which promulgates standards for the operation of hospitals.

These various activities show unmistakably that the plaintiff engages in transactions in interstate commerce, but it does so only incidentally to the conduct of its principal business which is that of operating a hospital in Raleigh, North Carolina. All of the cases involving hospital and medical services seem to indicate that this is strictly a local, intra-state business. *United States v. Oregon State Medical Society*, 343 U.S. 326 (1952); *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167 (8th Cir. 1959), *cert. denied*, 361 U.S. 884 (1959); *Riggall v. Washington County Medical Society*, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958); *Robinson v. Lull*, 145 F. Supp. 134 (N.D.Ill. 1956); *Spears Free Clinic and Hospital for Poor Children v. Cleere*, 197 F.2d 125 (10th Cir. 1952). Yet it is the conduct of this business of the plaintiff upon which the alleged unlawful restraint of defendants is operating, not those interstate activities which plaintiff finds necessary or expedient in the conduct of its hospital business.

But,

> "The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." *Page v. Work*, 290 F.2d 323, 330 (9th Cir. 1961).

The conclusion is that the conduct of the defendants complained of in this case directly affects only a local activity of the plaintiff, and only incidentally and insubstantially does it

affect interstate commerce. The Sherman Act has therefore not been properly invoked, and the court is without subject matter jurisdiction. *Lieberthal v. North Country Lanes, Inc.*, 332 F. 2d 269 (2nd Cir. 1964).

Accordingly, it is now

Ordered that the motions of the defendants are allowed and the action is dismissed.

/s/ F. T. DUPREE, JR.
United States District Judge

March 23, 1973.

OPINION

(Filed February 6, 1974)

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 73-1627

Hospital Building Company,

Appellant,

v.

Trustees of The Rex Hospital, a Corporation; Joseph Barnes; George Stockbridge; Richard Urquhart, Jr.,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F. T. Dupree, Jr., District Judge.

Argued December 6, 1973 Decided: February 6, 1974

Before Bryan, Winter and Widener, Circuit Judges.

John K. Train, III (John R. Jordan, Jr., Timothy S. Perry, Jordan, Morris and Hoke, Alston, Miller & Gaines, on brief) for Appellant; Ray S. Bolze (Thomas W. Steed, Jr., John H. Anderson, John R. Fornaciari, Allen, Steed & Pullen, Smith, Anderson, Blount & Mitchell, Howrey, Simon, Baker & Murchison, on brief) for Appellees; (Carl Weissburg, Lawrence E. Mindell, Weissburg, Jacobs and Gerst, on brief for Amicus Curiae Federation of American Hospitals).

Per Curiam:

After oral argument, review of the briefs and review of the record, we are not persuaded that the district court was in error when it concluded that the effect of defendants' alleged conspiracy in restraint of trade was neither to restrain activities in the flow of interstate commerce nor to restrain local activities having a substantial effect on interstate commerce.

AFFIRMED.

ORDER

(Filed June 11, 1974)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1627

Hospital Building Company,

Appellant,

v.

Trustees of The Rex Hospital, a Corporation; Joseph Barnes; George Stockbridge; Richard Urquhart, Jr.,

Appellees.

Order

The petition for rehearing of Hospital Building Company, containing a suggestion for rehearing in banc, has been referred to the entire court. A poll on the suggestion for rehearing was requested and a majority of the judges eligible to vote have voted to grant rehearing in banc.

Accordingly, it is Ordered that the motion for rehearing in banc be, and it is hereby, granted; the previous opinion of the panel is withdrawn; and the Clerk is directed to restore the case to the hearing calendar and to fix a date for rehearing in banc during a regular session of the court as soon as practicable. The Clerk is further directed to fix a schedule for the filing of supplemental briefs if either of the parties desires to file the same.

For the Court:

/s/ HARRISON L. WINTER
United States Circuit Judge

OPINION

(Filed February 18, 1975)

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 73-1627

Hospital Building Company,

Appellant,

Federation of American Hospitals,

Amicus Curiae,

versus

Trustees of The Rex Hospital, a Corporation; Joseph Barnes; George Stockbridge; Richard Urquhart, Jr.,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F. T. Dupree, Jr., District Judge.

(Argued October 3, 1974 Decided February 18, 1975)

Before Haynsworth, Chief Judge, Bryan, Senior Circuit Judge, and Winter, Craven, Butzner, Russell, Field, and Widener, Circuit Judges, sitting en banc.

John K. Train, III, and Timothy S. Perry (Jordan, Morris and Hoke and Alston, Miller and Gaines and John R. Jordan, Jr., on brief) for Appellant; (Carl Weissburg, Lawrence E. Mindell and Weissburg, Jacobs and Gerst on brief for Amicus Curiae Federation of American Hospitals); Ray S. Bolze and John H. Anderson (Thomas W. Steed, Jr.; John R. Fornaciari; Allen, Steed and Pullen; Smith, Anderson, Blount and Mitchell; Howrey, Simon, Baker, and Murchison; Lillard H. Mount; Richard M. Hutson, II; and Hofler, Mount, White and Long on brief) for Appellee.

CRAVEN, Circuit Judge:

In this action filed pursuant to sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, appellant Hospital Building Corporation (HBC) sought treble damages in excess of $2 million and injunctive relief for alleged violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The sole question before us is whether the district court erred when it dismissed HBC's amended complaint on the ground that it failed to allege a sufficient nexus with interstate commerce to invoke the Sherman Act.

I

The motion to dismiss was lodged under Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. Whether termed "lack of jurisdiction over the subject matter" or "failure to state a claim upon which relief can be granted," the result of such a motion, if granted, is the same. Dismissal under Rule 12, the lineal descendant of demurrer, is, of course, merely a decision on the pleadings. For that reason, such motions "are granted sparingly and with caution." 5 Wright & Miller, Federal Practice and Procedure, § 1349, at 541. Especially is this so in antitrust cases "because it may be difficult to plead more precisely the effects on interstate commerce until discovery has been had." *Chapiewsky v. G. Heileman Brewing Co.*, 297 F. Supp. 33, 38 (W.D. Wis. 1968). Generally, we think that where a question of fact arises as to the substantiality of the impact of a local restraint on interstate commerce, the question should not be decided on a motion to dismiss. *Donlan v. Carvel*, 209 F. Supp. 829, 831 (D. Md. 1962). Our task would be much simpler

had the district court converted the motion to one for summary judgment as authorized by the last sentence of Rule 12(b). Such a course would doubtless have involved the district court and counsel in limited discovery procedures, but we think the extra time and effort would have been worthwhile.

Whether the complaint was dismissed for lack of subject matter jurisdiction *or* failure to state a claim upon which relief could be granted is not clear. Since Congress specifically has conferred jurisdiction of Sherman Act claims (15 U.S.C. §§ 15 and 26), we think it the better analysis to treat an insufficient plea of effect upon interstate commerce as a failure to state a claim upon which relief can be granted rather than lack of jurisdiction (in the sense of power) over the subject matter. So viewed, our distaste for judgment on the pleadings is even greater, for a motion to dismiss for failure to state a claim "is viewed with disfavor and [should be] rarely granted." 5 Wright & Miller, *supra*, § 1357 at 598.

Nevertheless, we have concluded to affirm. That we do so should be taken by the bar and the district judges as a rare exception to prove the rule that judgments of dismissal on the pleadings in antitrust cases will ordinarily be reversed.

II

HBC operates in Raleigh, North Carolina, a 49-bed proprietary hospital, Mary Elizabeth Hospital, which offers general medical-surgical hospital services to the public. The appellees, referred to by HBC in its brief and hereinafter by us as "the Raleigh Group," are a North Carolina corporation that runs a hospital in competition with Mary Elizabeth in Raleigh and various individuals involved in the provision of medical-surgical hospital services in Raleigh. HBC alleged below that, beginning at least as early as 1970 and continuing through the present, the Raleigh Group together with others not parties to this suit

have engaged in a conspiracy aimed at controlling the number of hospital beds, allocating customers (hospital patients), and otherwise exercising unreasonable restraints of and monopolizing the market for medical-surgical hospital services in "the Raleigh area," defined as "the area comprising Wake County, in the State of North Carolina."

HBC professed to have discovered the conspiracy in late 1971 when it undertook to relocate Mary Elizabeth and expand it from 49 to 140 beds. According to HBC the Raleigh Group and their coconspirators devised a scheme involving bad faith efforts to block authorization of the expansion,[1] tactics to hold up implementation of HBC's plans once authorization was gained, and finally malicious instigation of adverse publicity and general public antipathy. HBC alleged that the scheme has delayed expansion of Mary Elizabeth, and asked as damages treble the amount of direct costs and loss of revenue attributable to the delay. HBC also sought injunctive relief against a continuation of the alleged conspiracy. Because we conclude that the district court was correct in finding that even if HBC proved all of its factual allegations it still would have shown an insufficient connection with interstate commerce to invoke the Sherman Act, we affirm.

III

An antitrust plaintiff may establish the necessary connection with interstate commerce in either of two ways: by demonstrating that the alleged anticompetitive conduct occurred *in* interstate commerce, or by showing that the

[1] At the time HBC sought authorization, North Carolina law required a certificate of need prior to hospital expansion. *See* In Re Certificate of Need for Astron Park Hosp., Inc., 282 N.C. 542, 193 S.E.2d 729 (1973), in which the requirement was held to violate the constitution of North Carolina.

conduct, though wholly intrastate, had a substantial *effect on* interstate commerce.

Greenville Publishing Co. v. The Daily Reflector, Inc., 496 F.2d 391, 395 (4th Cir. 1974) (emphasis added). *See also Goldfarb v. Virginia State Bar*, 497 F.2d 1, 16 (4th Cir.), *cert. granted*, 43 U.S.L.W. 3246 (U.S. Oct. 29, 1974) (No. 74-70); *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341, 343 (9th Cir. 1969); *Lieberthal v. North Country Lanes, Inc.*, 332 F.2d 269, 271-72 (2d Cir. 1964). Within this traditional analytic framework the question for decision is whether the conspiracy described in HBC's complaint has either directly restrained *or* substantially affected interstate commerce.

IV

There is little basis for HBC's assertion that the alleged conspiracy acts directly in interstate commerce. The Raleigh Group is concerned exclusively with restraining Mary Elizabeth's provision of hospital services and with controlling the market for such services in the Raleigh area. The provision of hospital services has consistently been held to be a purely local activity. *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167, 170 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Spears Free Clinic v. Cleere*, 197 F.2d 125, 126 (10th Cir. 1952). Therefore, anticompetitive conduct aimed at the provision of such services necessarily acts *directly* only upon *intrastate* commerce. *See United States v. Oregon State Medical Society*, 343 U.S. 326, 338-39 (1952); *Elizabeth Hospital, Inc. v. Richardson, supra; Riggall v. Washington County Medical Society*, 249 F.2d 266, 268 (8th Cir. 1957); *cert. denied*, 355 U.S. 954 (1958); *Spears Free Clinic v. Cleere, supra.*

HBC's argument that the Raleigh Group's anticompetitive conduct occurred "in commerce" amounts to this: (1) Mary

Elizabeth, and hospitals in general, have become substantially enmeshed in the interstate commerce network through their use of interstate communications facilities, their subjection to extensive federal regulation, their purchases of materials and services from out-of-state, their treatment of patients from other states, and their financial arrangements with national health insurers and government welfare programs; (2) the conspiracy directly affected Mary Elizabeth; therefore, the conspiracy, by acting upon a hospital so entwined in interstate commerce, acted directly upon interstate commerce. We accept the premises of the syllogism but reject the conclusion.

It is settled that the "in commerce" test is not whether the conduct complained of is aimed at a business engaged in interstate commerce, but whether the conduct complained of acts directly upon the interstate aspects of such a business. *United States v. Yellow Cab Co.*, 332 U.S. 218, 230-34 (1947); *Sun Valley Disposal Co. v. Silver State Disposal Co., supra*, 420 F.2d at 343; *Liberthal v. North Country Lanes, Inc., supra*, 332 F.2d at 271; *Savon Gas Stations Number Six, Inc. v. Shell Oil Co.*, 309 F.2d 306, 308-09 (4th Cir. 1962); *cert. denied*, 372 U.S. 911 (1963); *Page v. Work*, 290 F.2d 323, 330 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961). Here, no matter how entwined in our increasingly national economy Mary Elizabeth and other Raleigh area hospitals may be, the fact remains that the conspiracy complained of directly affected only one aspect of those hospitals' businesses, namely the provision of surgical-medical hospital services in the Raleigh area. And the provision of such services remains what it always has been: a local, intrastate activity, not interstate commerce.

In its argument that "in commerce" jurisdiction exists HBC relies heavily on language from *Rasmussen v. American Dairy Association*, 472 F.2d 517 (9th Cir.), *cert. denied*, 412 U.S. 950 (1973). We cannot see the relevance of that case to our situation for purposes of the "in commerce" test. The court in

Rasmussen indicated, although it did not decide conclusively, 472 F.2d at 524-25, that the "in commerce" test was met by a restraint on the intrastate sale of a filled-milk product called "Go" which was manufactured instate from ingredients all but one of which originated out of state. The court was able to suggest that the restraint acted directly upon the flow of commerce formed by "Go" and its ingredients because—as the court said—"for all practical purposes, the out-of-state ingredients *are* 'Go.' " *Id.* at 525 (original emphasis). *Cf. Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). Here, in contrast, there is no out-of-state product that is passed to patients in an economic transaction as a dominant ingredient of hospital services in the Raleigh area. Probably the only out-of-state products sold by Mary Elizabeth are drugs, and they are sold not so much as part of the interstate trade in drugs, but rather as a small and inseparable component of the *service* provided by Mary Elizabeth. This case is therefore different from *Northern California Pharamaceutical Ass'n v. United States*, 306 F.2d 379, 386-87 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962), where the court found sales of drugs by pharmacies part of the interstate commerce flow of drugs: there, the drugs in their flow from manufacturer to ultimate consumer never lost their character as both a *product* and a distinct line of commerce.

V

It is not so easy to decide the result under the second, or "affecting commerce," branch of the analysis. Here the fact that the Raleigh Group's conduct acted directly only upon a local market and a local aspect of Mary Elizabeth's business is not dispositive. The question remains whether that conduct, though local in its immediate motive and effect, nevertheless so substantially[2] affects interstate commerce as to invoke the Sherman

[2] The volume, amount, or quantity of interstate commerce involved is irrelevant under the "in commerce" test, but may be crucial under the "affecting commerce" test. *See* Greenville Publishing Co. v. The Daily Reflector, Inc., 496 F.2d 391 n.6, 395 (4th Cir. 1974); Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 526-28 (9th Cir.), *cert. denied*, 412 U.S. 950 (1973); Las Vegas Plumbers Merchant Ass'n v. United States, 210 F.2d 732, 739-40 n.3 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954); United States v. Richter Concrete Corp., 328 F. Supp. 1061, 1065-66 (S.D. Ohio 1971). As in other contexts, *see e.g.*, United States v. LeFaivre, No. 74-1239 (4th Cir. Dec. 4, 1974), the Congress utilized its recognized power over commerce to reach detrimental activity. "The addition of the words 'or commerce among the several states' was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes . . ." Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940). Thus if anticompetitive conduct occurs *in* commerce, to whatever degree, the Sherman Act is triggered. But if anticompetitive conduct occurs wholly *intra*state, Congress has left to the courts to decide whether such conduct "is sufficiently related to interstate commerce to justify the prohibition of that conduct as 'necessary and proper' to the protection of interstate commerce against the presumed economic burdens resulting from the anti-competitive practices." Rasmussen v. American Dairy Ass'n, *supra*, at 524.

Act. That can only be a matter of degree, and such matters are never clean:

> There is no bright line dividing cases in which the effect upon interstate commerce is sufficient to permit Congress to prohibit particular anticompetitive activity under the commerce clause from those cases in which it is not sufficient. In this area perhaps more than in most, each case must turn on its own facts.

Rasmussen v. American Dairy Association, supra, 472 F.2d at 526.

HBC suggests several ways in which interstate commerce has been affected by the Raleigh Group's thwarting of the Mary Elizabeth expansion. Neither the hospital's interstate purchases of supplies and equipment,[3] its billings to national insurance

[3] Mary Elizabeth's purchases totalled $112,846 in 1972, 80 percent of which sum was paid pursuant to national contracts negotiated by HBC's parent corporation.

companies and the federal government,[4] nor its purchases of management services from its parent corporation[5] have increased as they would were the hospital to expand. And the $4 million cost of expansion was to be financed by non-North Carolina lenders, so that substantial interest payments would flow across state lines.

Aware that such decisions should be exercises of reasoned economic judgment rather than applications of mechanistic formulae, *see Rasmussen v. American Dairy Association, supra,* 472 F.2d at 523, we conclude that the various ramifications noted by HBC do not add up to a sufficiently substantial effect upon interstate commerce to satisfy Sherman Act requirements. The effect here seems to us the indirect and fortuitous consequence of the restraint of the intrastate Raleigh area hospital market, rather than the result of activity purposely directed toward interstate commerce.[6] Although not controlling, this factor is relevant to the issue of substantiality. *See, e.g., Spears Free Clinic v. Cleere, supra,* 197 F.2d at 127; *Marstion v. Ann Arbor Property Managers (Management) Association,* 302 F. Supp. 1276, 1280 (E.D. Mich. 1969), *aff'd per curiam,* 422 F.2d 836 (6th Cir.), *cert. denied,* 399 U.S. 929 (1970). More-

[4] Such billings represented approximately 95 percent of Mary Elizabeth's total billings in 1972.

[5] $36,000 in 1972. HBC's parent corporation was incorporated and is located outside of North Carolina, so that the purchase of services can be deemed interstate.

[6] An example of anticompetitive conduct that is aimed at a local market and yet directly and purposefully affects interstate commerce is that in United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945). Liquor dealers in Colorado conspired to fix retail liquor prices within the state, a purely local aim. But as a means of accomplishing their purpose they agreed both to compel out-of-state liquor producers to enter into fair trade contracts and to boycott those producers who failed to do so. The Supreme Court in finding Sherman Act jurisdiction focused upon this tactic of the conspirators, stating that "[w]hatever was the ultimate object of this conspiracy, the means adopted for its accomplishment reached beyond the boundaries of Colorado." 324 U.S. at 298.

over, when the various economic consequences are sorted out and considered in the perspective of their respective markets,[7] it is obvious that none of them could have more than negligible impact: no source of supply or insurance company or lending institution can be expected to go under if Mary Elizabeth doesn't expand, and no market price likely will be affected. In short, we are unconvinced that the alleged conspiracy, even if successful, can affect interstate commerce in the detrimental manner that concerned Congress when it passed the Sherman Act. *Cf. Page v. Work, supra,* 290 F.2d at 332-33.

In deciding that there is here insufficient impact on interstate commerce to invoke the Sherman Act we do not overlook *Doctors, Inc. v. Blue Cross of Greater Philadelphia,* 490 F.2d 48 (3d Cir. 1973). The Third Circuit in that case found jurisdiction over an alleged conspiracy of Blue Cross and a hospital planning agency aimed at manipulating the Greater Philadelphia hospital services market to Blue Cross's benefit. The court based its finding on the fact that the conspiracy, if successful, could shut down many of the approximately 100 hospitals in the Greater Philadelphia area, which could affect as much as $23 million per year in interstate shipments of supplies. According to the court, and we agree, this potential effect upon the traffic in out-of-state goods was "substantial enough" to invoke the Sherman Act. 490 F.2d at 53.

We think *Doctors, Inc.* is distinguishable. There is simply no significant comparison between the effect on commerce of one small hospital's delayed expansion, especially when other hospitals contemplate expansion, and the vastly greater effect of the possible closing of a significant percentage of the hospitals in a metropolitan area. The *Doctors, Inc.* court carefully

[7] *Cf.* Rasmussen v. American Dairy Association, 472 F.2d 517, 527 (9th Cir.), *cert. denied,* 412 U.S. 950 (1973); "The basic issue . . . is the extent to which a prohibition of the defendants' specific conduct is justifiable as a means of protecting *the specific line of interstate commerce involved.*" (emphasis added).

distinguished its situation from *Lieberthal v. North Country Lanes, Inc., supra,* and *Page v. Work, supra,* referring to them as "good law" and "the kinds of cases which remain beyond the reach of interstate commerce jurisdiction." 490 F.2d at 54. We agree and conclude that this case resembles *Lieberthal* and *Page* more than *Doctors, Inc.*[8]

Having quite plausibly, we think, fit this case into its appropriate pigeonhole entitled "nonsubstantial or de minimis effect on interstate commerce," we are left with a feeling of dissatisfaction. Labeling one case "de minimis" and another as "affecting commerce" does achieve a result but is not otherwise very revealing. Anyone who studies decisions applying the "affecting commerce" test will be struck by the absence of a clear line, much less a bright one, between those effects that are deemed substantial and those that are characterized as "indirect," or "fortuitous," or "insubstantial," or "de minimis," or "sporadic," or "incidental." In any area so very gray it is absurd to suppose that we or any other court can precisely count up the tons of plaster, bottles of liquor, or quantity of proprietary drugs sufficient to cross the line of substantiality. Increasingly, intrastate economic conduct affects interstate commerce due to the interdependence of all segments of our national economy. Whether or not "de minimis" has ever been an effective litmus for application of the Sherman Act, we doubt that it now is, and we are concerned that conventional impact analysis may sometimes conceal rather than reveal the true rationale of decision.

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[8] In *Lieberthal* the conspiracy was aimed at preventing the opening of one bowling alley, as here it is aimed at preventing expansion of one hospital. In *Page* the court found that a conspiracy to control legal advertising in a local market would not substantially affect commerce in newsprint and other products, since by far the major consumers of such products remained untouched by the conspiracy; here, as noted in the body, the failure of Mary Elizabeth to expand could have no noticeable detrimental effect on the various lines of commerce suggested by HBC.

Rather than attempt a quantitative measurement of interstate involvement, we should, perhaps, consider instead the real danger, in a practical sense, of anti-competitive conduct to the flow of commerce, or the potential destructive power of a conspiracy. It seems to us that courts have been doing that for a long time without necessarily saying so. Such an approach is implicit in the format and choice of words of Mr. Justice Black in *United States v. Employing Plasterers Ass'n,* 347 U.S. 186 (1954). The opinion runs only three pages. The approach is a sweeping one suggesting indignation that a local group of people were "able to *dictate* who could and who could not buy plastering materials that had to reach Illinois through interstate trade if they reached there at all." 347 U.S. at 189 (italics added). Such restraints are characterized as capable of causing "unreasonable burdens on the free and uninterrupted flow of plastering materials into Illinois." *Id.* Notable by its absence is any quantitative analysis. Omitted is any detailed narrative of the type of commerce involved. Instead there is simply a note of impatience that any district judge could possibly have dismissed a Sherman Act complaint that alleged defendants' power to *control* the intrastate market.

Similarly, in *Burke v. Ford,* 389 U.S. 320 (1967), the Supreme Court peremptorily reversed a court of appeals in a two-page per curiam. The economics of the case and description of the commerce involved were reduced to a footnote. The Court focused not on how many bottles of bourbon went from place to place but on its apprehension that this *intra*state conspiracy ould "invariably reduce competition" and cause a price in-.ease. 389 U.S. at 321.

The evil of monopoly power is the theme of both *Employing Plasterers* and *Burke.* Not one word is said about whether the anticompetitive conduct substantially *or* insubstantially affects interstate commerce.

In our case there is no allegation that the Raleigh Group has the power to put HBC out of business, or indeed, upon a fair reading of the whole amended complaint, that it can do any more than delay, at most, whatever expansion seems economically wise to the plaintiff. In *Doctors, Inc.*, on the other hand, the plaintiffs alleged that defendants had the power to shut down a hundred hospitals. Thus the real difference between our case and *Doctors, Inc.* may be not so much the quantitative difference in effect on interstate commerce as the dramatic difference in anticompetitive *power*—the danger Congress sought to guard against. Viewed in such a manner the cases seem more persuasively different than if simply stuffed into their respective pigeonholes of insubstantial and substantial impact on interstate commerce.

AFFIRMED.

ADDENDUM

On December 17, 1974, after the preparation of the opinion in this case, the Supreme Court released its decision in *Gulf Oil Corp. v. Copp Paving Co.*, No. 73-1012. Mr. Justice Powell's opinion for the Court notes that the grant of certiorari was limited to questions arising under the Clayton and Robinson-Patman Acts. What is said about the Sherman Act, by way of comparison with those Acts, is not new, slip opinion at 7-8. Although dictum as to the Sherman Act, we think language on page 12 of the slip opinion is consistent with our belief that problems of application of trade control statutes cannot be solved by counting units of merchandise.

> The justification for an expansive interpretation of the "in commerce" language, if such an interpretation is viable at all, must rest on a congressional intent that the Acts reach all practices, even those of local character, harmful to the national market place. This justification, however, would require courts to look to practical consequences, not to apparent and perhaps nominal connections between commerce and activities that may have no significant economic effect on interstate markets.

Winter, Circuit Judge, dissenting:

Although I concurred in the panel decision affirming the district court's dismissal of the amended complaint for failure to allege a sufficient nexus with interstate commerce to sustain a cause of action under the Sherman Act, I am now persuaded that the holding was incorrect. In my view, this amended complaint may not be dismissed *on the pleadings*. Of course, I express no view as to whether the jurisdictional allegations can be proved, but plaintiff should be afforded the opportunity to establish them, if not at trial, at least by a *prima facie* showing to defeat any motion by defendants for summary judgment. I therefore dissent from the majority's affirmance of the district court's dismissal of the amended complaint under Rule 12, F.R.Civ.P.

I

The amended complaint alleges that the action is brought to redress actions of the defendants which constitute "(1) a combination and conspiracy in restraint of trade in violation of Section 1 of the Sherman Act and (2) an attempt to monopolize in violation of Section 2 of the Sherman Act. . . ." Before the specific allegations of fact to support these jurisdictional assertions are considered, it is well to consider the scope of application of the Sherman Act. What combinations and conspiracies in restraint of trade and what attempts to monopolize does the Sherman Act prohibit?

There is no novelty in the answer. The settled law was recently restated in *Gulf Oil Corporation v. Copp Paving Company, Inc.* — U.S. —, 43 L.W. 4059 (December 17, 1974). See also *Greeneville Publishing Co. Inc. v. Daily Reflector, Inc.*, 496 F.2d 391, 395-96 (4 Cir. 1974). *Gulf Oil* was a case which turned on the jurisdictional requirements of § 2(a) of the Robinson-Patman Act and §§ 3 and 7 of the Clayton Act. It held that intrastate sales of asphalt for use in the construction of interstate highways were not sales "in commerce" within the ambit of the two Acts. In arriving at this result, the Court reviewed the jurisdictional scope of the two Acts and compared them with the jurisdictional scope of the Sherman Act.[1]

The Court contrasted the "in commerce" concept of the Robinson-Patman Act and the Clayton Act with the jurisdictional scope of the Sherman Act, saying:

> This "in commerce" language differs distinctly from that of § 1 of the Sherman Act, which includes within its scope all prohibited conduct "in restraint of trade or commerce among the several States, or with foreign nations. . . ." *The jurisdictional reach of § 1 thus is keyed directly to effects on interstate markets and the interstate flow of*

[1] The Court noted that § 2(a) of the Robinson-Patman Act forbids "any person engaged in commerce, in the course of such commerce" to make price discriminations "where either or any of the purchases involved in such discrimination are in commerce" and where the effect of the discrimination is to suppress competition "in any line of commerce." It also recited that § 3 of the Clayton Act renders unlawful tie-in sales or exclusive dealing arrangements by "any person engaged in commerce" where the effect "may be to substantially lessen commerce or create a monopoly in any line of commerce," and that § 7, forbidding certain acquisitions, similarly applies to acquirers engaged "in commerce" and prohibits them from acquiring the stock or assets of another corporation engaged "in commerce" where the effect may be substantially to lessen competition "in any line of commerce in any section of the country." It concluded that application of both acts turned on the concept of "in commerce," defined in § 1 of the Clayton Act as "trade or commerce among the several States and with foreign nations . . ."

> *goods.* Moreover, our cases have recognized that *in enacting § 1 Congress "wanted to go to the utmost extent of its constitutional power in restraining trust and monopoly agreements. . . ." United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 558 (1944). Consistently with this purpose and with the plain thrust of the statutory language, the Court has held that, *however local its immediate object, a "contract combination . . . or conspiracy" nonetheless may constitute a restraint within the meaning of § 1 if it substantially and adversely affects interstate commerce. E.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948). "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Manufacturing Association*, 336 U.S. 460, 464 (1949). (Emphasis in text added.) 43 L.W. at 406

With the standard of what the Sherman Act encompasses so clearly defined, I have no hesitancy in concluding that plaintiffs have alleged a sufficient adverse *effect* on interstate commerce to confer jurisdiction on the district court to decide the case on its merits.[2] Under *Gulf Oil*, the test is one of congressional power, and the question is whether Congress could reach the alleged conduct under the commerce power. This is the clear meaning of the statement that ". . . Congress 'wanted to go to the utmost extent of its constitutional power' . . ." The majority holds in effect that the alleged activity is too tenuously related to interstate commerce in a practical sense to justify federal regulation for antitrust reasons. In reaching this conclusion, the majority opinion, as its addendum demonstrates, applies a test designed for determining the jurisdictional ambit of the

[2] Of course, if the rendition of local hospital services was "in commerce," the Sherman Act would clearly apply. But no court has so held, and I think that the majority's conclusion that HBC's activities are not "in commerce" is a correct one.

Clayton and Robinson-Patman Acts. *Gulf Oil*, however, teaches that this test is inappropriate for actions brought under the Sherman Act. In any event, the majority's conclusion is based upon determinations of: (1) the quantitative impact on interstate commerce of the alleged conduct, assessed in terms of precedent sustaining and rejecting complaints, and (2) the qualitative importance of the anticompetitive power alleged in the complaint. By both, I think that proper application of the Sherman Act can be demonstrated.

II

As the majority opinion states, the conspiracy in which defendants allegedly engaged was to prevent Hospital Building Company (HBC) from expanding the capacity of its proprietary Mary Elizabeth Hospital in Raleigh, North Carolina, from 49 to 149 beds. HBC is a wholly-owned subsidiary of Charter Medical Corporation (Charter), which has its principal office in Macon, Georgia, and which, by contract, provides management services to HBC for a fee, including the negotiation of contracts for the purchase of hospital supplies. Suppression of the expansion, it was charged, was to enable defendants to reduce competition in local hospital services by HBC and to enable defendants to control the local hospital service market and thus to allocate it among themselves.

HBC averred that the alleged conspiracy had the following effects on interstate commerce:

> (1) It purchases approximately 80% of its supplies and medicines from vendors in states other than North Carolina. In 1972, excluding food and supplies for its kitchen, it purchased $112,846 of supplies for its radiology, medical laboratory, and electrocardiology operations and its pharmacy. If the hospital were enlarged from 49 to 149 beds, such purchases in interstate commerce would not only continue but increase substantially.
>
> (2) It regularly uses interstate communication, including the mails, to carry out its operations. It pays Charter a fee under the management contract with it. The fee is based on gross receipts, and for 1972 the fee was approximately $36,000. If the hospital were expanded, the amount of the fee would increase substantially.
>
> (3) The fees for hospital services and charges for many of the patients at the existing hospital are paid by insurors and other providers outside of North Carolina. Although not alleged, it may be inferred that if the hospital were expanded fees paid by out-of-state providers would increase substantially.
>
> (4) If the hospital were increased from 49 to 149 beds, the cost thereof would exceed $4,000,000. That cost would be financed by one or more loans with one or more lenders located outside of North Carolina. Payment of principal and interest would extend substantially into the future, and it would require regular remittances to a lender outside of North Carolina.

Conclusorily, HBC alleged that the combination and conspiracy which it charged has "a substantial and direct effect on interstate commerce." I agree. The allegations establish the suppression of an interstate cash flow that would be both substantial and continuing. *Cf.* Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2 Cir. 1964). I therefore am of the view that jurisdiction was alleged to exist in accord with the test reiterated in *Gulf Oil*.

III

Doctors, Inc. v. Blue Cross of Greater Philadelphia, 490 F. 2d 48 (3 Cir. 1973), as the majority points out, is a stronger

case than the instant one for concluding that the alleged conspiracy had a substantial effect on interstate commerce and that the Sherman Act applied. In *Doctors*, the named plaintiff purchased $233,430 in supplies from out-of-state suppliers in the test year. Although this figure does not seem to be of any greater magnitude than the projected flow alleged by the plaintiff here, the majority relies on the fact that Doctors' Hospital was typical of the approximately one-hundred other hospitals in the area against all of which the conspiracy was directed, so that it could properly be inferred that interstate purchases of great magnitude were jeopardized. The dictinction, however, is largely without difference. *Gulf Oil* reminds us that, in enacting § 1 of the Sherman Act, Congress was exercising to the *fullest extent* its constitutional power to restrain trusts and monopolies. Thus, it is not only the "big" resultant restraint on interstate commerce that it outlawed; the "little" resultant restraint on interstate commerce is outlawed too so long as a direct adverse effect on interstate commerce is demonstrated and that effect is not *de minimis*.

To be more specific, in *Doctors* the argument was advanced, as urged by the defendants here, that the object of the conspiracy was the intrastate activity of the rendition of hospital services and the effect on interstate commerce was indirect and insubstantial, so that the Sherman Act was inapplicable. In *Doctors*, the argument was rejected in terms which make that case a relevant and persuasive authority for reversing the district court in the instant case. Analyzing Burke v. Ford, 389 U.S. 320 (1967), and U.S. v. Employers Plasterers Ass'n, 347 U.S. 186 (1954), the Third Circuit pointed out that in both the Supreme Court found that a sufficient effect on the flow of out-of-state supplies to local businesses had been alleged to confer Sherman Act jurisdiction. 490 F.2d at 52. More importantly, "there [was not] even a concern with the specific magnitude of the impact on interstate commerce caused by the alleged conspiracy. Instead, the Court in each case ends its

inquiry when it has satisfied itself that the logical and therefore probable effect of the alleged act is to reduce the flow of goods in interstate commerce." 490 F.2d at 53.

I recognize and accept that there are instances in which the effect on interstate commerce of anticompetitive conduct aimed at local activities may be too insubstantial to invoke Sherman Act jurisdiction. Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2 Cir. 1964) (the one-time equipping of a new local bowling alley), and Page v. Work, 290 F.2d 323 (9 Cir. 1961) (alleging conspiracy to control legal advertising, thus causing a newspaper specializing in such advertising to sell its assets to another publisher who continued the paper and continued to buy the same quantity of newsprint from out-of-state sources), are good examples. But the instant case is more like *Doctors* than *Lieberthal* and *Page*. If HBC were permitted to expand, its purchases in interstate commerce and its other interstate activities would increase. It follows that an alleged conspiracy to prevent its expansion has an adverse effect on interstate commerce—not *de minimis*—and should be held to support jurisdiction under § 1 of the Sherman Act.

IV

Similarly, I view the anticompetitive power alleged here as substantial. In essence the plaintiffs allege that a local conspiracy was able to forestall out-of-state entry into the local hospital market. If by means of conspiracy and harassment those who hold a local market can foreclose or limit the entry of competition, capital, and initiative from out-of-state, then it seems to me that the federal interest in interstate commerce is directly involved. To conclude, as the majority does, that the plaintiffs here do not allege the kind of anticompetitive power which "Congress sought to guard against" is merely to disbelieve the plaintiff's allegations. In the Sherman Act, not only the

"evil of monopoly power," but the evil of improper attempts to achieve it are condemned. Where, as here, the out-of-state plaintiffs suggest that local official power and processes were used to delay and deter them, the plaintiffs implicate not only antitrust policy as such, but also the "national market" concerns which animate the commerce clause itself.

HBC's allegations about the flow of financing, management services, and supplies to the hospital from out-of-state have been stated. Additionally, HBC alleges that the overwhelming majority of the fees paid to it come from the federal government and from out-of-state providers. Money thus flows from Blue Cross, private insurers, and the federal government to the hospital and thence to out-of-state suppliers, managers, and financiers. While this construction of the facts may not put HBC's provision of hospital services in the "flow" of commerce as that term is used in the case law, it does make it graphically clear that if HBC is affected, a wide range of interstate connections is affected.

There is, furthermore, clear and significant federal interest in at least one of these connections—the interstate flow of medicare and medicaid payments, and more generally with the costs of medical care in Wake County. Actual or attempted monopolization of the local market could have a dramatic effect, not only to decrease the flow of hospital payments, but to increase the cost of hospital care in the Raleigh area as well. If hospital care costs are increased, insurance costs will also increase, and federal and out-of-state providers will spread these increased costs beyond the local area in which they are incurred. And this is so even if the overall market for hospital care in the Raleigh area is neither increased nor diminished, but only concentrated in the hands of the hospital defendants.

Under all these circumstances, I think it myopic to maintain that the service itself is rendered locally. Local patient care may

be the hub of hospital operation, but the spokes—financing, supplies, management, and fee payments—all have out-of-state implications. The hub cannot be braked without affecting the spokes.

Judge Butzner and Judge Field authorize me to say that they, too, dissent and concur in this dissenting opinion.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1452

HOSPITAL BUILDING COMPANY,
Petitioner,

v.

TRUSTEES OF REX HOSPITAL, A CORPORATION; JOSEPH BARNES, GEORGE STOCKBRIDGE, AND RICHARD URQUHART, JR.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

RAY S. BOLZE
JOHN R. FORNACIARI
HOWREY, SIMON, BAKER & MURCHISON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

THOMAS W. STEED, JR.
ALLEN, STEED & PULLEN
P. O. Box 2058
Raleigh, North Carolina 27602

JOHN H. ANDERSON
SMITH, ANDERSON, BLOUNT & MITCHELL
P. O. Box 750
Raleigh, North Carolina 27602

LILLARD MOUNT
HOFFLER, MOUNT, WHITE & LONG
102 East Main Street
Durham, North Carolina 27701
Attorneys for Respondents

June 17, 1975

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1452

HOSPITAL BUILDING COMPANY,
Petitioner,

v.

TRUSTEES OF REX HOSPITAL, A CORPORATION; JOSEPH BARNES, GEORGE STOCKBRIDGE, AND RICHARD URQUHART, JR.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The citations to the opinions below are adequately set forth in the Petition (Pet. 1 and 2).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition (Pet. 2).

QUESTION PRESENTED

Whether this Court should review the *en banc* decision of the Fourth Circuit Court of Appeals applying the well established and clear standards for interstate commerce jurisdiction under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, to the uncontested facts alleged in petitioner's amended Complaint, where the court below had, after a second review and argument, again affirmed dismissal of petitioner's amended Complaint.

STATUTES INVOLVED

The pertinent statutes are reproduced in the Petition (Pet. 4 and 5).

STATEMENT OF THE CASE

A. Nature of the Case

This is a private antitrust action concerning an alleged conspiracy which purportedly resulted in a four-month delay in the approval of petitioner's application *to expand* the facilities of Mary Elizabeth Hospital in Raleigh, North Carolina. Petitioner Hospital Building Company ("HBC") instituted this antitrust action against respondents on October 10, 1972, by filing its Complaint alleging violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and seeking treble damages and injunctive relief pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26).

Petitioner HBC, a North Carolina corporation having its principal office and place of business in Raleigh, North Carolina, operates the Mary Elizabeth Hospital in Raleigh, North Carolina. (J. App. at 3; Compl. ¶ 3).[1]

[1] "J. App." refers to the joint Appendix to the Briefs submitted below on appeal which were filed by the parties with the Clerk of the Fourth Circuit Court of Appeals. "Compl." refers to the Complaint filed in this action by petitioner HBC.

Mary Elizabeth Hospital is a 49-bed hospital facility engaged in "offering general medical-surgical services to the public" for profit. (J. App. 3 and 6; Compl. ¶¶ 3 and 12.)

Respondent Trustees of The Rex Hospital ("Rex Hospital") is a public, non-profit, tax-exempt hospital located in Raleigh, North Carolina, and "offers general medical-surgical hospital services to the public in Raleigh, North Carolina." (J. App. 3; Compl. ¶ 4.) Respondent Joseph Barnes, a local resident of Raleigh, North Carolina, is the administrator of Rex Hospital; respondent Richard Urquhart, Jr., a local resident of Raleigh, North Carolina, is a member of the board of trustees of Rex Hospital; and respondent George Stockbridge, a resident of Durham, North Carolina, is an officer of the Health Planning Council for Central North Carolina. (J. App. 3 and 4; Compl. ¶¶ 5, 6 and 7.)

The Complaint alleges that pursuant to then effective North Carolina law,[1] petitioner, on November 4, 1971, applied to the North Carolina Medical Care Commission ("the Medical Care Commission"), a state agency, for a "Certificate of Need" approving the petitioner's planned expansion of the Mary Elizabeth Hospital, in Raleigh, North Carolina, from a 49-bed facility to a 140-bed facility. (J. App. 14; Compl. ¶ 17(C).) According to the "Certificate of Need Law," petitioner's application was referred to the Health Planning Council for Central North Carolina (the "Planning Council"), a local health

[1] Under the "Certificate of Need Law," Sections 90-289, *et seq.*, Title 21, General Statutes of North Carolina, any person that desired to increase the number of hospital beds or facilities in North Carolina was required to obtain a "Certificate of Need" approving the proposed increase from the North Carolina Medical Care Commission. (J. App. 12; Compl. ¶ 17(B).) The "Certificate of Need" Law has been declared unconstitutional under the Constitution of North Carolina by the North Carolina Supreme Court. *See, In re Aston Park Hospital,* 282 N.C. 542, 193 S.E. 2d 729 (S.Ct. N.C. 1973), a decision which may render moot much if not all of petitioner's case.

planning agency, for its recommendation. (J. App. 12, 14 and 15; Compl. ¶¶ 17(B) and (C).)

It is alleged that respondents Rex Hospital and its administrator and Wake County Hospital [1] and respondent George Stockbridge, a member of the Planning Council, conspired to and did in bad faith oppose petitioner's application before the Planning Council. As a result, the Planning Council entered a negative recommendation on petitioner's application with the Medical Care Commission. (J. App. 15 and 16; Compl. ¶ 17(C).)

On June 30, 1972, the Medical Care Commission approved petitioner's application, even though the Planning Council and respondent Rex Hospital, purportedly in furtherance of the alleged conspiracy, had appeared before the Medical Care Commission in opposition to petitioner's application. (J. App. 17-19; Compl. ¶¶ 17(D)-(F).) Neither the respondents nor any other person sought or obtained a stay of the Medical Care Commission's order granting petitioner's "Certificate of Need," and petitioner could have initiated its expansion of Mary Elizabeth Hospital on June 30, 1972. Petitioner admits that a "Certificate of Need" may not have been granted until March 1, 1972, even if petitioner's application were uncontested. (J. App. 26; Compl. ¶ 24.)

B. The Commerce Allegedly Restrained

The Complaint makes clear that the conduct complained of, the alleged conspiracy described above, was directed at and affected only the provision of *additional* hospital services by Mary Elizabeth Hospital in the "Raleigh area," defined in the Complaint as "Wake County, in the State of North Carolina" (J. App. 5; Compl. ¶ 9). In Count I of its complaint, petitioner alleges that respondents engaged in a "conspiracy in

[1] Wake County Hospital System, Inc., is organized under the laws of the State of North Carolina. (J. App. 5; Compl. ¶ 8(A).)

unreasonable restraint of the . . . trade and commerce in the furnishing of medical-surgical hospital services." (J. App. 9; Compl. ¶ 15.) In Count II, petitioner alleges that the conduct complained of constitutes "an attempt by defendant [respondent] Rex to monopolize and to conspire . . . to attempt to monopolize, the paid hospital business . . . in the Raleigh area." (J. App. 27; Compl. Count II, ¶ 3.)

It is alleged that the effect of the conduct complained of was "to prevent and restrain competition in the furnishing of *additional* medical-surgical hospital services to the public. . . ." (J. App. 24; Compl. ¶ 18; emphasis added) and to delay petitioner "from proceeding with construction of the additional medical-surgical hospital beds. . . ." (J. App. 25; Compl. ¶ [illegible]) The alleged illegal acts and the product market affected thereby were all geographically limited to Wake County. (J. App. 5, 7 and 8; Compl. ¶¶ 9 and 13.)

C. Proceedings in the District Court and Court of Appeals

On January 2, 1973, respondents, pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure, filed motions and supporting memoranda to dismiss for lack of subject matter jurisdiction. Petitioner, on January 29, 1973, filed a detailed factual amendment to the jurisdictional allegations of its Complaint (J. App. 39-45; Amended Compl. ¶ 14).

Respondents filed an amendment to their motions to dismiss and oral argument was scheduled and held on February 22, 1973, in the Raleigh Division of the Federal District Court for the Eastern District of North Carolina. On March 23, 1973, the District Court entered its order granting respondents' motions to dismiss, and stating: ". . . the conduct of defendants [respondents] complained of in this case directly affects only a local activity of plaintiff [petitioner] and only incidentally and insub-

stantially does it affect interstate commerce." (Pet. D-3 to D-4.)

Upon appeal by petitioner, the United States Court of Appeals for the Fourth Circuit, on February 6, 1974, affirmed *per curiam* the order of the District Court. (Pet. C-1.) On June 11, 1974, the Fourth Circuit Court of Appeals granted petitioner's application for a rehearing *en banc* and withdrew its prior opinion. (Pet. B-1.)

After submission of supplemental briefs and oral argument, the court below sitting *en banc* again affirmed dismissal of petitioner's Complaint. The court below found that the conduct complained of did not occur in interstate commerce. (Pet. A-6.) Contrary to petitioner's suggestion (Pet. 2), the dissent below specifically approved the finding of the majority that the alleged restraint on petitioner's provision of hospital services in Raleigh, North Carolina, did not occur in interstate commerce. (Pet. A-16 n.2.)

The majority of the court also found that the conduct complained of did not have a substantial effect on interstate commerce. (Pet. A-9 to A-10.) This determination was reached after a practical analysis of the effect of the alleged anticompetitive conduct on the flow of commerce. (Pet. A-12 to A-13.)

ARGUMENT

A. The *En Banc* Decision Was Correct and Presents No Important Federal Question or Conflict with Other Decisions

The *en banc* decision of the court below expressly applied the well-established and clear guidelines for jurisdiction under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2:

> An antitrust plaintiff may establish the necessary connection with interstate commerce in either of two ways: by demonstrating that the alleged anticompetitive conduct occurred *in* interstate commerce, or by showing that the conduct, though wholly intrastate, had a substantial *effect on* interstate commerce. (Pet. A-5; emphasis in original.)

Those jurisdictional guidelines were succinctly set forth and followed in *Burke* v. *Ford*, 389 U.S. 320, 321 (1967), where this court, citing *United States* v. *Employing Plasterers' Assn.*, 347 U.S. 186 (1954), stated that "[I]t is well established that an activity which does not itself occur *in* interstate commerce comes within the scope of the Sherman Act if it substantially *affects* interstate commerce (emphasis in original)."[1] The application of those jurisdictional guidelines in the *en banc* decision below is in harmony with prior decisions of the Fourth Circuit and other circuits.[2]

Nowhere in the Petition is it contended that the *en banc* decision below applied incorrect guidelines for determining jurisdiction under Sections 1 and 2 of the

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[1] In *Gulf Oil Corp.* v. *Copp Paving Co., Inc.*, —— U.S. ——, 95 S. Ct. 392, 398 (1974), the Court recently affirmed the vitality of the "substantially affects commerce" guideline, stating ". . . however local its immediate object, a 'contract, combination . . . or conspiracy' nonetheless may constitute a restraint within the meaning of § 1 [Sherman Act] if it substantially and adversely affects interstate commerce." *Accord, Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948); *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 297 (1945); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 230 (1947); *United States* v. *Women's Sportswear Assn.*, 336 U.S. 460, 464 (1949).

[2] *See, e.g., Greenville Publishing Co., Inc.* v. *Daily Reflector, Inc.*, 496 F.2d 391, 395 (4th Cir. 1974); *United States* v. *Bensinger Company*, 430 F.2d 584, 588 (8th Cir. 1970); *Marston* v. *Ann Arbor Property Man. Ass'n.*, 302 F.Supp. 1276 (E.D. Mich. 1969), *aff'd per curiam*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970); *Wolf* v. *Jane Phillips Episcopal Memorial Medical Center*, —— F.2d ——, Vol. 5 CCH Trade Reg. Reptr. ¶ 60,251 (10th Cir. April 7, 1975); *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d 269 (2d Cir. 1964); *Yellow Cab Co. of Nevada* v. *Cab Emp., Auto & W., Local 881*, 457 F.2d 1032 (9th Cir. 1972).

Sherman Act, 15 U.S.C. §§ 1 and 2. Instead, petitioner argues that the result reached by the court below is different than the result reached by other courts in actions concerning alleged conspiracies to restrain the provision of hospital services and in other cases, and therefore, the *en banc* decision below conflicts with those other decisions.

Petitioner misses the point. "The judicial inquiry" relating to interstate commerce jurisdiction under Sections 1 and 2 of the Sherman Act "turn[s] . . . on the circumstances presented in each case and require[s] a particularized judicial determination. . . ." (*Gulf Oil Corp.* v. *Copp Paving Company, Inc.*, —— U.S. ——, 95 S. Ct. at 399 n.12.) Or as stated in *Rasmussen* v. *American Dairy Association*, 472 F.2d 517, 526 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973), a case relied upon by petitioner: "In this area perhaps more than most each case must turn on its own facts."[1]

The Petition conspicuously avoids setting forth the substance of the Complaint allegations. In the instant case, it must be emphasized that petitioner has alleged the purported conspiracy was directed at the "furnishing of medical-surgical hospital services" offered by Mary Elizabeth Hospital, and the attempt or conspiracy to monopolize was directed at "the paid hospital business . . . in the Raleigh area," which is geographically limited by the Complaint to Wake County "in the State of North Carolina." (J. App. 5, 9 and 27; Compl. ¶¶ 9, 15 and Count II, ¶ 3.) The effect of respondents' alleged illegal conduct has been "to prevent and restrain competition in the furnishing of *additional* medical-surgical hospital services to the public . . ." in the Raleigh area

[1] This same approach was adopted by the *en banc* decision below (Pet. A-8) and emphasized by the court in *St. Bernard General Hospital, Inc.* v. *Hospital Service Association*, —— F.2d —— (5th Cir. April 7, 1975), (No. 74-2186), (Pet. E-1, at E-11).

and to prevent petitioner from proceeding with construction of the *additional* medical-surgical hospital beds. . . ." (J. App. 24-25 Compl. ¶¶ 18 and 19; emphasis added.)

Petitioner does not and cannot contend that the alleged foregoing effects were accomplished by a conspiracy directed at and intended to regulate the supplies, equipment, financing or any other commercial activity incidental to and separable from the furnishing of hospital services by Mary Elizabeth Hospital in the Raleigh area. Petitioner alleges only that the alleged restraint was perpetrated by respondents' purported conspiratorial opposition to petitioner's application for a Certificate of Need before the Medical Care Commission.

Applying the clear guidelines for jurisdiction under Sections 1 and 2 of the Sherman Act to the Complaint allegations, the court below analyzed the conduct complained of and correctly found that the Complaint allegations failed to meet the "in commerce" guidelines. (Pet. A-6.) The dissenters below expressly approved the majority's determination that the alleged conspiracy to restrain the provision of hospital services by Mary Elizabeth Hospital did not operate "in commerce." (Pet. A-16 n.2.)[1]

In determining that the conduct complained of failed to satisfy the "in commerce" guideline, the court below correctly analyzed the alleged target at which the purported conspiracy was directed or aimed. (Pet. A-6.)

[1] *Accord, Elizabeth Hospital, Inc.* v. *Richardson*, 269 F.2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Spears Free Clinic and Hospital for Poor Children* v. *Cleere*, 197 F.2d 125 (10th Cir. 1952); *Riggall* v. *Washington County Medical Society*, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958); *Robinson* v. *Lull*, 145 F. Supp. 134 (N.D. Ill. 1956); *United States* v. *Oregon State Medical Society*, 343 U.S. 326 (1952), *aff'g*, 95 F. Supp. 103 (D. Ore. 1950); *Nankin Hospital* v. *Michigan Hosiptal Service*, 361 F. Supp. 1199 (E.D. Mich. 1973); *Jackson* v. *American Medical Assn.*, 1967 Trade Cases ¶ 71,992 (S.D. Cal. 1967).

This approach has been followed by this Court [1] and by circuit courts as well.[2]

Contrary to petitioner's interpretation (Pet. 10), the court below did not find, as a matter of law, that the provision of hospital services is a "purely local activity," but scrutinized petitioner's Complaint allegations and determined:

> Here, no matter how entwined in our increasingly national economy Mary Elizabeth and other Raleigh area hospitals may be, the fact remains that the conspiracy complained of directly affected only one aspect of those hospitals' businesses, namely the provision of surgical-medical hospital services in the Raleigh area. And the provision of such services remains what it always has been: a local, intrastate activity, not interstate commerce. (Pet. A-6.)

Indeed, the court below expressly agreed with *Doctors, Inc.* v. *Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3rd Cir. 1973), implicitly indicating that, given facts sufficient to satisfy the jurisdictional requirements of the Sherman Act, it would also find jurisdiction under the

[1] *See, e.g., United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947) (where this Court looking to the object or purpose of the alleged conspiracy (the commerce "toward which this aspect of the conspiracy is directed" (*Id.* at 230)), found it lacked jurisdiction under the Sherman Act); and *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 297 (1945) (where this Court stated ". . . [L]ocal conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce").

[2] *See, e.g., Yellow Cab Co. of Nevada* v. *Cab Emp. Auto. & W., Loc. 881*, 457 F.2d 1032, 1035 (9th Cir. 1972); *Marston* v. *Ann Arbor Property Man. Assn.*, 302 F. Supp. 1276, 1280 (E.D. Mich. 1969), *aff'd per curiam*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970); *Spears Free Clinic and Hospital* v. *Cleere*, 197 F.2d 125, 127 (10th Cir. 1952); *Page* v. *Work*, 290 F.2d 323, 330 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961).

Sherman Act over an alleged conspiracy to restrain hospital services. (Pet. A-10.)

The court below also correctly found that the conduct complained of could not have a substantial effect on interstate commerce. Quoting from *Rasmussen* v. *American Dairy Association*, 472 F.2d 517, 523 (9th Cir.), *cert. denied*, 412 U.S. 950 (1973), the court below observed that ". . . such decisions should be exercises of reasoned economic judgment rather than applications of mechanistic formulae. . . ." (Pet. A-9.) Applying its "reasoned economic judgment" (Pet. A-9) to the Complaint allegations, it held:

> . . . [W]e conclude that the various ramifications noted by HBC do not add up to a sufficiently substantial effect upon interstate commerce to satisfy Sherman Act requirements. The effect here seems to us the indirect and fortuitous consequence of the restraint of the intrastate Raleigh area hospital market, rather than the result of activity purposely directed toward interstate commerce. Although not controlling, this factor is relevant to the issue of substantiality. [Citation omitted.] Moreover, when the various economic consequences are sorted out and considered in the perspective of their respective markets, it is obvious that none of them could have more than negligible impact. . . . (Pet. A-9 to A-10; footnotes omitted.)

The court below emphasized the facts in the instant case concerned ". . . one small hospital's *delayed* expansion. . . ." (Pet. A-11; emphasis added.) The Complaint allegations make clear that petitioner was successful in obtaining approval from the Medical Care Commission to expand Mary Elizabeth Hospital in Raleigh, North Carolina, that from the date petitioner filed its application, November 4, 1971, until petitioner obtained approval, June 30, 1972, only eight months elapsed, and that approval by the Medical Care Commission would

not have been granted until March 1, 1972, even if respondents had not contested petitioner's application. Accordingly, the four-month delay in obtaining approval for the expansion of Mary Elizabeth Hospital could have no substantial adverse effect on interstate commerce in the travel of potential out-of-state patients or the supply of drugs and equipment or any other incidental contact Mary Elizabeth Hospital had with interstate commerce.

In addition, precedent squarely holds that each of the incidental out-of-state transactions with which Mary Elizabeth Hospital has contact is insufficient to satisfy the "substantial effects" guideline. *See, United States* v. *Oregon Medical Society*, 343 U.S. 326, 338-39 (1950), *aff'g*, 95 F.Supp. 103 (D. Ore. 1950) (where this Court affirmed a finding of lack of jurisdiction over an alleged local conspiracy to restrain competition in health insurance which conspiracy was formed by a statewide society of doctors who purchased drugs and equipment from out-of-state, treated patients from out-of-state and obtained insurance payments from out-of-state, 95 F. Supp. at 122-23); *Lieberthal* v. *North Country Lanes*, 332 F.2d 269 (2d Cir. 1964) (where the alleged local conspiracy was aimed at limiting the competition in bowling by preventing the construction of a bowling alley which was to be constructed with out-of-state materials and equipment); *Marston* v. *Ann Arbor Property Man. Ass'n.*, 302 F.Supp. 1276 (E.D. Mich. 1969), *aff'd per curiam*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970) (where the alleged local continuing conspiracy was directed at controlling and fixing the construction and rents of apartments in Ann Arbor which were leased to out-of-state travelers and built with out-of-state materials).[1]

[1] *See also, Spears Free Clinic and Hospital* v. *Cleere*, 197 F.2d 125, 126 (10th Cir. 1972); *Wolf* v. *Jane Phillips Episcopal Memorial Medical Center*, —— F.2d ——, Vol. 5 CCH Trade Reg. Rptr. ¶ 60,251 (10th Cir. April 7, 1975) (No. 74-1496); *Elizabeth Hospital* v. *Richardson*, 269 F.2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341, 343 (9th Cir. 1969); *Harrison* v. *Prather*, 435 F.2d 1168, 1175-76 (5th Cir. 1970); *Cotillion Club* v. *Detroit Real Estate Board*, 303 F. Supp. 850 (E.D. Mich. 1964).

Throughout the Petition, it is argued that the *en banc* decision construed the applicable jurisdictional standards too narrowly. (Pet. A-15.) Petitioner ignores the fact that after the court found Sherman Act jurisdiction lacking under the well established two-pronged guidelines, it went on to ". . . consider instead the real danger, in a practical sense, of anticompetitive conduct to the flow of commerce, or the potential destructive power of a conspiracy." (Pet. A-12.)

Under the foregoing analysis of the effect of the conduct complained of on the "flow of interstate commerce," an analysis which the petitioner contends was not made (Pet. 16), the *en banc* decision found:

> In our case, there is no allegation that the Raleigh Group has the power to put HBC out of business, or indeed, upon a fair reading of the whole amended complaint, that *it can do any more than delay, at most*, whatever expansion seems economically wise to the plaintiff. (Pet. A-13; emphasis added.)

Petitioner also suggests, as it did before the court below, that the "outcome of this case will determine" whether "hospitals are exempt from the Sherman Act." (Pet. 12.) Again, petitioner misses the point of the judicial determination of jurisdiction under the Sherman Act. Such determination is dependent upon the circumstances in each case and is a particularized judicial determination. *See, Gulf Oil Corp.* v. *Copp Paving Company, Inc.*, —— U.S. ——, 95 S.Ct. at 399 n.12 (1974). In agreeing with *Doctors, Inc.* v. *Blue Cross of Greater Philadelphia, supra*, the court below indicated that, given

the proper factual circumstances, jurisdiction would be found. (Pet. A-10.) Accordingly, this case is not similar, as petitioner claims (Pet. 23), to *Goldfarb* v. *Virginia State Bar, et al.*, 497 F.2d 1 (4th Cir. 1974), *cert. granted*, 419 U.S. 963 (1974) (Dkt. No. 74-70), where the circumstances involve the novel question of the exemption of alleged professional price fixing of fees by local associations of a "learned profession" in the multi-state area surrounding metropolitan Washington, D.C.

Petitioner also argues that "the federal government has a vital interest in the provision of hospital services" because it indirectly provides some funds to local agencies for in-state Medicare payments and, therefore, the conduct complained of substantially affects interstate commerce. (Pet. 22.) If this were the test for Sherman Act jurisdiction, virtually every walk of life has some connection with the Federal bureaucracy and would be within reach of the Sherman Act. State antitrust laws, such as North Carolina's antitrust laws (G.S. North Carolina, §§ 75-1, *et seq.*, (Michie 1975 Replacement)), should then be repealed as ineffective. *See, Cotillion Club, Inc.* v. *Detroit Real Estate Board*, 303 F.Supp. 850, 853-54 (E.D. Mich. 1964).

Contrary to petitioner's assertion (Pet. A-12), the *en banc* decision is not in conflict with *Doctors, Inc.* v. *Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3rd Cir. 1973). As the *en banc* decision observed (Pet. A-10 to A-11), the facts in *Doctors, Inc., supra*, are vastly different from the facts in the instant case. The alleged conspiracy in *Doctors, Inc., supra*, was directed at the provision of hospital services furnished by approximately 100 hospitals in an interstate geographic market consisting of eight counties located in Pennsylvania and New Jersey (490 F.2d at 49, n.1 and 51), and the effect of the conspiracy would have been to close down Doctors Hospital and "to close down or limit the operation" of approximately 100 other hospitals at which the conspiracy was aimed. (490 F.2d at 51.)

Likewise, the *en banc* decision is not in conflict with *St. Bernard General Hospital, Inc.* v. *Hospital Services Association of New Orleans, Inc.*, —— F.2d —— (5th Cir. April 7, 1975) (Pet. E-1). The Fifth Circuit in *St. Bernard, supra*, discussed the *en banc* decision below and emphasized the significant factual differences between *St. Bernard, supra*, and the *en banc* decision below. (Pet. E-9 to E-10.)[1] The Fifth Circuit in *St. Bernard, supra*, specifically stated that "We do not consider our disposition to be in conflict with the very recent *en banc* opinion by the Fourth Circuit in *Hospital Building Co.* v. *Trustees of the Rex Hospital*, 4th Cir." [footnotes omitted], and commented with approval that "the Fourth Circuit affirmed the dismissal of a single small hospital's Sherman Act complaint for lack of jurisdiction." (Pet. E-9 to E-10, footnotes omitted.)

Nor is the *en banc* decision in conflict with *Rasmussen* v. *American Dairy Association*, 472 F.2d 517 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973). As the *en banc* decision emphasized, the facts in *Rasmussen* were not at all similar to the facts in the case below and involved a conspiracy aimed at restraining the sale of a product that was in the flow of interstate commerce. (Pet. A-7.) *See also* 472 F.2d at 525.

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[1] In *St. Bernard*, plaintiff initiated a class action on behalf of itself and nine other hospitals in the New Orleans area against the nine remaining hospitals in the New Orleans area and Blue Cross of New Orleans, alleging defendants had conspired to impose discriminatory health insurance contracts on plaintiff and the class members, which contracts prevented plaintiff and the class from earning a profit on Blue Cross business. (Pet. E-4.) The complaint contained no allegations as to the effect of the alleged conspiracy on interstate commerce (Pet. E-6) and the Fifth Circuit did not find Sherman Act jurisdiction but merely remanded the case for further proceedings.

Petitioner also argues that the *en banc* decision below conflicts with *Burke* v. *Ford*, 389 U.S. 320 (1967) and *United States* v. *Employing Plasterers' Assn.*, 347 U.S. 186 (1954). (Pet. 18.) The facts in those cases underscore the lack of jurisdiction in the instant case. In *Burke* v. *Ford*, this Court applying the "substantial and direct" guideline found Sherman Act jurisdiction existed where all the liquor wholesalers in the state conspired to allocate territories for the sale of liquor, *all* of which liquor sold in the state was shipped into the state from other states. 389 U.S. at 320-21.

And, in *United States* v. *Employing Plasterers' Ass'n.*, *supra*, the Court found jurisdiction present where a labor union and a trade association of contractors, which contractors did 60% of the plastering contract business in Chicago, conspired "to prevent out-of-state contractors from doing any business in the Chicago area and to bar entry of new local contractors" without union approval. (347 U.S. at 188.) The Court stated: "A local group of people were to a large extent able to dictate who could and who could not buy plastering materials that had to reach Illinois through interstate" commerce. (347 U.S. at 189.) *See also, A. Cherney Disposal Co.* v. *Chicago & Suburban Refuse Disposal Ass'n.*, 484 F.2d 751, 753, n.1 (7th Cir.), *cert. denied*, 414 U.S. 1131 (1973) (another case with which petitioner claims the *en banc* decision below conflicts (Pet. 20), but where plaintiff alleged defendants refuse collectors, their trade association and out-of-state equipment manufacturers had conspired "to restrain and monopolize the private scavenger business within the geographic area including Chicago, its suburbs, parts of Indiana, and Wisconsin . . . and St. Joseph, Missouri," and where defendants allegedly pressured out-of-state equipment manufacturers to refuse to deal with plaintiffs).

The *en banc* decision dismissing the amended Complaint allegations simply measured those allegations against the well established jurisdictional guidelines for Sherman Act jurisdiction. There is no conflict in decisions nor important fundamental issue raised by the *en banc* decision.

B. The *En Banc* Decision Correctly Affirmed Dismissal of the Action on the Amended Complaint Allegations

The *en banc* decision correctly affirmed dismissal of the action on the basis of petitioner's amended Complaint allegations. Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure specifically contemplate such action and the case authority is legion on the correctness of this dismissal for failure to state a claim or for lack of jurisdiction over the subject matter under the Sherman Act.[1]

After having respondents' memorandum in support of its motion to dismiss for approximately four weeks, petitioner filed a detailed factual amendment to the jurisdiction allegations in its Complaint. (J. App. 39-45;

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[1] *See, e.g., Wolf* v. *Jane Phillips Episcopal Memorial Medical Center*, —— F.2d ——, Vol. 5 CCH Trade Reptr. ¶ 60,251 (10th Cir. April 7, 1975) (No. 74-1496); *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F. 2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Riggall* v. *Washington County Medical Society*, 249 F. 2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958); *Robinson* v. *Lull*, 145 F.Supp. 134 (N.D. Ill. 1956); *Jackson* v. *American Medical Association*, 1967 Trade Cases ¶ 71,992 (S.D. Cal. 1967); *Marston* v. *Ann Arbor Property Managers Assn.*, 302 F. Supp. 1276 (E.D. Mich. 1969), *aff'd per curiam*, 422 F. 2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970); *Lieberthal* v. *North Country Lanes, Inc.*, 332 F. 2d 269 (2nd Cir. 1964); *Hotel Phillips, Inc.* v. *Journeymen Barbers*, 195 F. Supp. 664 (W.D. Mo. 1961), *aff'd*, 301 F. 2d 443 (8th Cir. 1962); *Evanston Cab Co.* v. *City of Chicago*, 325 F. 2d 907 (7th Cir.), *cert. denied*, 377 U.S. 943 (1963); *United States* v. *Yellow Cab Co.*, 322 U.S. 218 (1947); *Yellow Cab Co. of Nevada* v. *CAB Employers, Automotive & Warehousemen, Local 881*, 457 F. 2d 1032 (9th Cir. 1972).

Amended Compl. ¶ 14.) Respondents' memorandum in support of their motions to dismiss made petitioner fully aware of the jurisdictional defects in its Complaint. Petitioner had more than ample opportunity to present facts to satisfy the Sherman Act's jurisdictional requirements.

It is clear from the Transcript of the hearing before the District Court that petitioner intended that the facts in its amended Complaint be conclusive with respect to jurisdiction under the Sherman Act, and that those allegations constituted the totality of the purported interstate commerce affected by the conduct complained of.[1] Moreover, the Transcript of the hearing is barren of any suggestion that petitioner had need of discovery to allege sufficiently the jurisdictional requirements of the Sherman Act.

In affirming dismissal, the *en banc* decision made clear that its decision to affirm dismissal on the Complaint allegations was a "rare exception." (Pet. A-3.) Thus, the court below was aware that the facts in the instant case were clearly insufficient to satisfy the Sherman Act jurisdictional requirements.

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[1] Petitioner stated to the District Court:

> We have amended our complaint to set forth in substantial detail the facts which we intend to prove with respect to the involvement of interstate commerce because we felt that we'd like to move forward in this case and get to the merits of it and we would like the Court to have before it as soon as possible the facts that we felt justifies this Court in exercising its jurisdiction to deal with this particular situation, as we see it, this particular anti-competitive situation that we feel violates the Sherman Act.
>
> We have set forth the various facts which we believe satisfy both the tests Mr. Bolze has referred to. (Transcript before the District Court, Civil No. 4048, February 22, 1973, at p. 26.)

CONCLUSION

The practice of this Court has been to grant writs of certiorari only in cases involving either principles of fundamental importance or a direct conflict in circuit court opinions. Respondents respectfully submit that the instant Petition presents no important questions of Federal Law or conflict of decisions calling for settlement by this Court. The Petition for writ of certiorari should be denied.

Respectfully submitted,

RAY S. BOLZE
JOHN R. FORNACIARI
HOWREY, SIMON, BAKER & MURCHISON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

THOMAS W. STEED, JR.
ALLEN, STEED & PULLEN
P. O. Box 2058
Raleigh, North Carolina 27602

JOHN H. ANDERSON
SMITH, ANDERSON, BLOUNT & MITCHELL
P. O. Box 750
Raleigh, North Carolina 27602

LILLARD MOUNT
HOFFLER, MOUNT, WHITE & LONG
102 East Main Street
Durham, North Carolina 27701

Attorneys for Respondents

Dated: June 17, 1975

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 74-1452

HOSPITAL BUILDING COMPANY,
Petitioner,

vs.

TRUSTEES OF THE REX HOSPITAL, a Corporation,
JOSEPH BARNES, GEORGE STOCKBRIDGE, and
RICHARD URQUHART, JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR PETITIONER

Of Counsel
ALSTON, MILLER & GAINES
1200 C&S National Bank Building
Atlanta, Georgia 30303

JORDAN, MORRIS and HOKE
1414 Branch Banking & Trust
Company Building
Raleigh, North Carolina 27602

JOHN K. TRAIN, III
TIMOTHY S. PERRY
ROBERT W. MILLER
1200 C&S National Bank Building
Atlanta, Georgia 30303
(404) 588-0300

JOHN R. JORDAN, JR.
1414 Branch Banking & Trust
Company Building
Raleigh, North Carolina 27602
(919) 828-2501

Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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IN THE

SUPREME COURT OF THE UNITED STATES

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HOSPITAL BUILDING COMPANY,
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RICHARD URQUHART, JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals, sitting *en banc*, is reported at 511 F.2d 678 (4th Cir. 1975). (App. 52). The order of the Court of Appeals granting rehearing *en banc* and withdrawing the previous opinion of the panel is not reported. (App. 51). The opinion of the panel of the Court of Appeals affirming *per curiam* the order of the District Court is reported in 1974-1 Trade Cases ¶ 74,903. (App. 49). The opinion of the District Court (Civil No. 4048) is reported in 1973-1 Trade Cases ¶ 74,428. (App. 46).*

* All citations to the Single Appendix are denoted "(App. . . .)".

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). An opinion of a panel of the United States Court of Appeals for the Fourth Circuit in this case was first filed and entered on February 6, 1974 affirming *per curiam* the order of the District Court. Thereafter a petition for rehearing *en banc* was filed on February 20, 1974. On June 11, 1974, the petition for rehearing *en banc* was granted, and the opinion of the panel was withdrawn. The opinion of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, affirming the order of the District Court over the dissent of Judges Winter, Butzner, and Field was entered on February 18, 1975. The Petition for Writ of Certiorari was filed on May 19, 1975 and granted on October 6, 1975. — U.S. —, 44 U.S.L.W. 3178.

QUESTIONS PRESENTED

This case presents the question of the scope of Congressional power exerted in the Sherman Act to prohibit (i) anti-competitive conduct in providing hospital services and (ii) attempted monopolization of hospital services. This question arises in the context of a nationwide network of financing hospital services through Medicare (federal health insurance for the aged and disabled), Medicaid (federal grants to states with medical assistance programs), and national private health insurance companies.

In particular, the questions presented are:

1. Is the impact on interstate commerce of a conspiracy to block expansion of a hospital so insubstantial that the hospital cannot, as a matter of law, state a claim for relief satisfying the "effect on commerce" test of jurisdiction under the Sherman Act where the following facts are alleged:

(a) The proposed expansion is a virtual tripling of the facility's capacity at a cost of $4,000,000 expected to be financed by one or more out-of-state lenders;

(b) The hospital in 1972, prior to the proposed expansion, purchased $112,846 of supplies and equipment, 80% of which were purchased pursuant to national contracts negotiated by the hospital's out-of-state parent corporation;

(c) The hospital purchased $36,000 of management services in 1972, prior to the proposed expansion, from its out-of-state parent corporation;

(d) Approximately 95% of the hospital's billings in 1972, prior to the proposed expansion, were made to sources of payment under the Medicare and Medicaid programs and to health insurance companies, many of which are located out-of-state; and

(e) The principal conspirators are the hospital's only two competitors in the market who seek to restrict output in order to maintain and fix prices, to allocate customers and submarkets, and to foreclose effective entry to the market by the hospital?

2. Is providing hospital services a purely local, intrastate activity, so that an anticompetitive conspiracy to restrain or attempting to monopolize such hospital services cannot, as a matter of law, be subject to a claim for relief satisfying the "in commerce" test of jurisdiction under the Sherman Act?

3. Did the District Court err in dismissing a Sherman Act Complaint on the pleadings, either for failure to state a claim or for lack of jurisdiction, without any discovery and without the submission of any evidence?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Constitution of the United States, Article I, Section 8, Clause 3 provides in relevant part:

> "The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States . . ."

2. The Sherman Act, Section 1 (15 U.S.C. § 1) provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

3. The Sherman Act, Section 2 (15 U.S.C. § 2) provides in relevant part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

4. The Clayton Act, Section 4 (15 U.S.C. § 15) provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

5. The Clayton Act, Section 16 (15 U.S.C. § 26) provides in relevant part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue . . ."

6. 28 U.S.C. § 1337 provides:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

STATEMENT OF THE CASE

A. Nature of the Conspiracy Alleged.[1]

This is a civil antitrust action for treble damages of at least $2,400,000 and injunctive relief brought by petitioner Hospital Building Company ("HBC"), a North Carolina corporation.

HBC operates a proprietary (for profit) hospital ("Mary Elizabeth") in Raleigh, North Carolina.[2] (App. 10). There are

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[1] Unless otherwise noted, the facts referred to in this portion of the Brief are taken from the Complaint, as amended. (App. 9).

[2] The geographic market involved is the Raleigh area, defined as Wake County, North Carolina. (App. 12).

only two other hospitals in the Raleigh area to compete with HBC in providing medical-surgical hospital services. (App. 36). One of these hospitals, Rex Hospital ("Rex"), is a private tax-exempt hospital operated by Defendant Trustees of Rex Hospital, a corporation. (App. 10). The other is a government hospital, Wake County Memorial Hospital ("Wake"), operated by the Wake County Hospital System, Inc. named as a co-conspirator but not as a defendant. (App. 11).

Rex and Wake, together with certain individual trustees, administrators, and agents named as defendants or co-conspirators (the "Raleigh Group"),[3] have conspired at least since 1970 to:

1. Restrict production of hospital services in the Raleigh area in order to hold prices at artificially high, non-competitive levels, (App. 15);

2. Allocate between themselves alone the customers of and submarkets for hospital services in the Raleigh area, (App. 15); and

3. Foreclose effective entry by HBC (and necessarily by others as well) into the Raleigh market. (App. 15, 19).

HBC alleges these activities violate Section 1 of the Sherman Act. (App. 14). In addition, HBC alleges Rex has attempted to monopolize a submarket of hospital services by non-public hospitals in the Raleigh area at least since 1970 in violation of Section 2 of the Sherman Act. (App. 26).

In the course of this conspiracy covering the entire Raleigh market for hospital services, the Raleigh Group conspired in

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[3] Defendant Barnes is an administrator of Rex. (App. 10). Defendant Urquhart is a trustee of Rex. (App. 11). Defendant Stockbridge is an agent of the conspiracy and Executive Secretary of the Health Planning Council for Central North Carolina. (App. 11, 17). Co-conspirator Andrews is the administrator and Executive Director of Wake. (App. 11). Co-conspirator Holley is a member and former chairman of the Health Planning Council for Central North Carolina. (App. 11).

particular to block the expansion, modernization, and relocation within the relevant market area of Mary Elizabeth, HBC's hospital. (App. 16-24). Though not expressly alleged, Mary Elizabeth was already a competitor in the Raleigh area when the first overt act of the conspiracy occurred[4] and at all times relevant to this action has had a capacity of 49 beds located in the same facility it currently occupies. In December, 1970 (over 10 months after the first overt act of the conspiracy),[5] Charter Medical Corporation ("Charter") purchased all of the stock of HBC with the intention of effectively entering the Raleigh market by expanding and relocating Mary Elizabeth from one place to another, both within the Raleigh area. (App. 34). Charter is a Delaware corporation with its principal place of business in Macon, Georgia.[6] As fairly implied from the allegation that the delay of this expansion and relocation "forestall[ed] the capacity of plaintiff to compete effectively in the Raleigh area" (App. 19), Charter was unable effectively to enter the Raleigh area market through operation of Mary Elizabeth absent such expansion.

The full force of the Raleigh Group's conspiracy became apparent to HBC upon its filing on November 4, 1971 (over 21 months after the first overt act of the conspiracy) with the Medical Care Commission[7] of an application for a certificate of need

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[4] In January, 1970, Rex and Wake caused the Joint Long Range Planning Committee to be formed. The report of this committee endorsed the Raleigh Group's design and has been used as a device to further that design. (App. 15-16).

[5] See footnote 4 above.

[6] At the time the Complaint was filed Charter owned, directly or indirectly, and operated nine other hospitals, located in Georgia, Louisiana, Virginia, and Nevada and managed hospitals in Georgia, Texas, Virginia, and Puerto Rico as well. (App. 34).

[7] The Medical Care Commission was the state body empowered to issue certificates of need for the construction of new hospital beds. Such a certificate of need was then required by Gen. Stat. § 90-291, N.C. Session Laws, Chapter 1164, ratified July 1, 1971. (App. 16).

requesting approval of an expansion of Mary Elizabeth from 49 to 140 beds. (App. 18).

The Medical Care Commission was expected to solicit and receive recommendations of local agencies on such applications which were not binding but were, as a practical matter, of great importance in the process. (App. 16). The Raleigh Group utilized the local agency for the Raleigh area, the Health Planning Council, as a tool of their conspiracy. (App. 16-18). The Raleigh Group, using its positions of responsibility on the Health Planning Council, caused it to carry out a charade of considering HBC's application by denying HBC any chance for a fair hearing before the Health Planning Council, and caused that Council to recommend to the Medical Care Commission that HBC's application to expand and relocate its facilities be denied. (App. 16-18).[8] This adverse recommendation was made despite the fact that the State of North Carolina projected a shortage of 409 medical-surgical hospital beds in the Raleigh area alone. (App. 19).[9]

Thereafter, the Raleigh Group attempted in bad faith to deny HBC access to the Medical Care Commission. (App. 18-21). After numerous delays prompted by the Raleigh Group's actions, the certificate of need was granted by the Medical Care Commission to HBC on June 30, 1972, almost seven months after its application was filed. (App. 21). At the same time it was opposing HBC's application, Rex filed an application on its own behalf to expand by 109 beds. (App. 22). In sharp contrast to the delays encountered by HBC, Rex's application (filed May 4, 1972) received expedited treatment by the Health Planning Council and the Medical Care Commission, and was granted on July 20, 1972, less than three months after the filing of its application. (App. 22).

[8] HBC contends that these activities go far beyond the permissible area defined by this Court in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), but this issue is not now presented for decision.

[9] HBC sought to expand its capacity by 91 additional beds. (App. 19).

To this date, neither HBC nor Rex has begun construction of this new capacity.[10] HBC alleged that, absent the Raleigh Group's conspiracy, it would have begun construction of the new Mary Elizabeth on or before March 1, 1972. (App. 26). Soon after HBC was granted the certificate of need, however, the Raleigh Group caused the Health Planning Council on July 28, 1972 to file in bad faith an appeal seeking a reversal of that grant. (App. 23).[11] This baseless appeal, further delaying construction of the new Mary Elizabeth, was ultimately dismissed by consent on February 6, 1973 after the decision of the North Carolina Supreme Court that the certificate of need statute violated the constitution of North Carolina.[12] By that time, however, the damage to HBC as a result of these calculated delays was substantial. The commitment of financing for the new expansion expired by its own terms, and the change in national economic conditions that took place during and after the period of delay has hampered efforts to structure alternative financing. In addition, HBC still faces an entrenched, anticompetitive conspiracy of its only two competitors in the relevant market, a conspiracy which HBC has alleged the Raleigh Group will not abandon unless compelled to do so by court order. (App. 22,

[10] Some statements of fact made in this paragraph are not alleged in the Complaint, in part because the events described occurred after the filing of the Complaint.

[11] Respondents are correct that "[n]either the respondents nor any other person sought or obtained a stay of the Medical Care Commission's order granting petitioner's 'Certificate of Need' . . ." (Brief for Respondents in Opposition, p. 4) but they fail to mention this baseless appeal.

[12] *In Re Certificate of Need for Aston Park Hospital, Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973). The instant action was filed October 10, 1972 (App. 9), over three months before the *Aston Park* decision (January 26, 1973).

23). Nevertheless, despite these serious handicaps, HBC fully intends to press its expansion of Mary Elizabeth. HBC has selected and acquired the site for the new hospital at a cost of approximately $800,000 and is actively seeking the financing necessary to begin construction. In addition, HBC has retained architects to complete design of the facility, has submitted the architectural drawings to the necessary government authorities for approval, and has received comments back from such authorities, all at a cost exceeding $100,000. Certainly the current success of the Raleigh Group's conspiracy in crippling HBC's efforts effectively to enter the Raleigh area should not shield the Raleigh Group from the dictates of the Sherman Act.

B. Facts Underlying Sherman Act Jurisdiction.

Looking first at the conspiracy's impact on HBC itself as distinguished from the impact on the Raleigh market as a whole, HBC alleged the following facts:

1. HBC, as well as Rex and Wake, receive payment for hospital services from out-of-state. HBC's charges for such services in 1972 were made to the following sources:

(a) Medicare 36.3%,

(b) Medicaid 2.1%,

(c) Private insurance programs 54.1%, and

(d) Direct to patient 5.5%. (App. 36).[13]

2. HBC purchases substantial amounts of goods and supplies from out-of-state vendors, 80% of which are purchased pursuant to contracts negotiated by its out-of-state

[13] As noted by Judge Winter in dissent below, "although not alleged, it may be inferred that if the hospital were expanded fees paid by out-of-state providers would increase substantially." (App. 69).

parent, Charter. In 1972 HBC purchased $112,846 of supplies (excluding food and kitchen supplies and including pharmacy purchases of $33,000). These purchases would increase substantially after expansion of Mary Elizabeth. (App. 35).

3. HBC purchases management services from its out-of-state parent, Charter. The fee, which is based on gross revenues, was $36,000 in 1972 and would increase substantially after expansion of Mary Elizabeth. (App. 35).

4. A substantial number of out-of-state patients seek hospital services in the Raleigh area. HBC competes with Rex and Wake to serve these persons. (App. 36).

5. The proposed expansion is a virtual tripling of the hospital's capacity at a cost of $4,000,000 to be financed by one or more out-of-state lenders (This cost estimate is based on the circumstances existing at the time the Complaint was filed. In the intervening three years costs have increased substantially). (App. 37).

Looking at the conspiracy's impact on the Raleigh market as a whole, HBC alleged the following:

"In its operation of Mary Elizabeth Hospital, Hospital Building Company is doing business in interstate commerce. The combination and conspiracy complained of herein has a substantial and direct effect on interstate commerce." (App. 37).

Certain obvious effects on the Raleigh market as a whole follow logically from the scope of the conspiracy alleged:

1. Restriction of production impedes the natural flow of supplies in interstate commerce to the market and limits the flow of payments under Medicare, Medicaid, and from out-of-state health insurers to the market.

2. Allocation of customers and submarkets diverts the natural flow of interstate commerce in supplies and payments from one hospital to other hospitals.

3. Foreclosure of effective entry stifles the natural flow of capital and other resources into the market.

Since HBC has knowledge primarily of actions with an immediate impact on it and has not had the benefit of discovery procedures to broaden its knowledge of the other actions of the conspiracy, most of the overt acts it alleges have a particular impact on HBC and its proposed expansion of Mary Elizabeth. The scope of the conspiracy alleged and the impact of that conspiracy, however, are not limited to HBC alone. In essence, the Raleigh Group has, to this point, successfully conspired since at least 1970 to keep the Raleigh area a two-hospital market (Rex and Wake) with HBC being a small and ineffective competitor whose efforts to compete are thwarted. As alleged, Rex and Wake have allocated the Raleigh market between themselves, have joined together to close off that market to competition, capital, and initiative from out-of-state by Charter through HBC, and have restricted output to maintain prices at high, non-competitive levels. (App. 15).

C. **Proceedings in the District Court.**

Upon motion of the Defendants under Rule 12(b)(1) and (6), and without any discovery, the District Court dismissed the Complaint, as amended, on the pleadings. The District Court did not state whether the reason for dismissal was failure to state a claim or lack of jurisdiction. The action dismissed was brought under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26). Subject matter jurisdiction lay in the District Court under 28 U.S.C. § 1337.

The District Court held that the hospital business alleged is "strictly a local, intra-state business" and that despite HBC's

transactions in interstate commerce, the "conduct of the defendants complained of in this case directly affects only a local activity of the plaintiff, and only incidentally and insubstantially does it affect interstate commerce." (App. 48-49).

D. **Proceedings in the Court Below.**

Upon appeal by HBC, a panel of the United States Court of Appeals for the Fourth Circuit affirmed the order of the District Court *per curiam*. (App. 49). The Federation of American Hospitals, a trade association of approximately 500 investor-owned hospitals across the United States in 1974 and now having over 1,100 member hospitals filed an *amicus curiae* brief in support of HBC's position on appeal stating its conviction that the "Court's decision on these issues will ultimately affect all investor-owned hospitals in this country."

Upon petition by HBC for rehearing *en banc*, the Fourth Circuit granted rehearing *en banc* and withdrew the previous opinion of the panel. (App. 51). After oral argument, the Fourth Circuit, sitting *en banc*, affirmed the order of the District Court over the dissent of Judges Winter, Butzner, and Field.

The majority in the Court of Appeals below, speaking through Judge Craven, held that the District Court dismissed the Complaint on the pleadings for failure to state a claim. The majority below did note, however, that the better course would have been to convert the Defendants' motions to ones for summary judgment with at least limited discovery but did not remand the case with that instruction. (App. 54).

As to the merits, the majority below held that providing hospital services is, as a matter of law, a "purely local activity". (App. 56). Accordingly, an anticompetitive restraint of the provision of hospital services could not satisfy the "in commerce"

test of jurisdiction under the Sherman Act. To state a claim for relief, HBC would therefore need to allege a conspiracy having a substantial effect on interstate commerce. The majority below then held that the conspiracy alleged did not have a substantial effect on interstate commerce. As noted in the dissent (App. 68), the majority below approached the question of substantial effect in two ways: first, it analyzed the conspiracy's quantitative impact on interstate commerce, and second, it analyzed the qualitative importance of the conspiracy's anti-competitive power.

In determining the substantiality of the quantitative impact, the majority below stated that the intent of the Raleigh Group to direct its conspiracy only at intrastate commerce was relevant in determining the substantiality of the effect on interstate commerce. (App. 60). Further, instead of measuring the conspiracy's quantitative impact on the flow of goods in interstate commerce to HBC, the majority below looked only to the impact on the suppliers of such goods and services and to the impact on the market price of such goods and services. (App. 61).

In determining the qualitative importance of the conspiracy's anticompetitive power, the majority below distinguished *Burke v. Ford*, 389 U.S. 320 (1967), *United States v. Employing Plasterers Ass'n.*, 347 U.S. 186 (1954), and *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3rd Cir. 1973). The majority below asserted that the Complaint in this case failed sufficiently to allege "anticompetitive power—the danger Congress sought to guard against." (App. 64).

Judge Winter, dissenting in the Court of Appeals below, joined by Judges Butzner and Field, cited this Court's discussion of the breadth of Sherman Act jurisdiction in *Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186, 194 (1974) and argued that the proper test was "whether Congress could reach the alleged conduct under the commerce power." (App

67). Though the dissent agreed with the majority below that the "in commerce" test of jurisdiction was not met, it argued that the conspiracy alleged did have a substantial and direct effect on interstate commerce. The dissent argued that the majority below inappropriately "applies a test designed for determining the jurisdictional ambit of the Clayton and Robinson-Patman Acts" instead of the broader test articulated by this Court in its discussion of Sherman Act jurisdiction in *Copp Paving Company, Inc.* (App. 67-68).

With regard to the quantitative impact of the conspiracy on interstate commerce, the dissent concludes "[t]he allegations establish the suppression of an interstate cash flow that would be both substantial and continuing." (App. 69).

As to the qualitative importance of the anticompetitive power alleged, the dissent stated that to conclude the allegations here do not demonstrate "the kind of anticompetitive power which 'Congress sought to guard against' is merely to disbelieve the plaintiff's allegations". (App. 71). The dissent viewed the power to "foreclose or limit the entry of competition, capital, and initiative from out-of-state" into the Raleigh market as "substantial" anti-competitive power. (App. 71).

Finally, the dissent emphasized the special nature of the federal interest in the health area:

> "There is, furthermore, clear and significant federal interest in at least one of these connections—the interstate flow of medicare and medicaid payments, and more generally with the costs of medical care in Wake County. Actual or attempted monopolization of the local market could have a dramatic effect, not only to decrease the flow of hospital payments, but to increase the cost of hospital care in the Raleigh area as well. If hospital care costs are increased, insurance costs will also increase, and federal and out-of-state providers will spread these increased costs

beyond the local area in which they are incurred. And this is so even if the overall market for hospital care in the Raleigh area is neither increased nor diminished, but only concentrated in the hands of the hospital defendants." (App. 72).

SUMMARY OF ARGUMENT

In enacting the Sherman Act, Congress exercised its full authority over interstate commerce under the Constitution. This case presents as its central issue whether this scope of Congressional power under the Constitution encompasses an anticompetitive conspiracy to restrain and attempting to monopolize the provision of hospital services in Raleigh, North Carolina. This issue arises in the context of a growing nationwide network of financing by the federal government through its Medicare and Medicaid programs and also by health insurance companies of the provision of these hospital services. The Raleigh Group's conspiracy to restrict production in order to maintain and fix prices for hospital services at high, anticompetitive levels, to allocate customers and submarkets, and to foreclose effective entry can only add to the spiralling, already astronomical costs of hospital care which have made that growing network of national financing essential.

I

The Raleigh Group's conspiracy substantially affects interstate commerce. HBC and hospitals in general engage in interstate transactions as an integral part of providing hospital services. These interstate transactions range from the acquisition of goods, supplies, and construction financing in interstate commerce to the receipt of payment for hospital services from the federal government under Medicare and Medicaid and from private health insurance companies. As this Court determined

in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), even a purely local conspiracy can substantially affect interstate commerce if the activities restrained are an integral part of interstate transactions. Unlike *Goldfarb* where the legal services restrained were merely ancillary to the sale of real property in interstate commerce, the provision of hospital services is the *essential core* of the interstate transactions in this case. A restraint of the essential core necessarily affects the whole range of these interstate transactions.

The substantiality of these clear effects on interstate commerce should not be discounted because they may have been in some sense unintended. Whether or not the conspiracy was purposely directed at interstate commerce is immaterial; it is the impact of the conspiracy, not the "interstate culpability" of the conspirators, which is relevant. The scope of Congressional power under the Constitution is not a function of the intent of the conspirators to injure interstate commerce but a function of the logical and therefore probable burden on interstate commerce as a result of the conspiracy. A conspiracy must take its victims' involvement in interstate transactions as it finds it and should be presumed to intend the logical consequences of its actions, particularly where there is no allegation of intent solely to affect intrastate commerce. In addition, just as no specific magnitude of the effect need be shown in order successfully to demonstrate a substantial effect, no specific impact on an interstate supplier or on a particular market price of supplies or services need be alleged. It is sufficient under the Sherman Act to show that the natural, unimpeded flow of interstate commerce is altered or diminished substantially by the conspiracy.

Apparently fearful that the increasing economic interdependence of all segments of the national economy will bring within the scope of Congressional power a new range of formerly "local" conduct, the majority below concluded that the "evil of

monopoly power" was the driving force behind the Sherman Act. (App. 63). In essence, the majority below restricted Congressional power to prohibit anticompetitive restraints by requiring a local conspiracy to attain monopoly power before any substantial effect on interstate commerce as a result of that conspiracy could be demonstrated. Yet, as noted in the dissent below, it is not merely the evil of monopoly power but the evil of improper attempts to achieve it which the Sherman Act proscribes. (App. 71-72). The concept of interstate commerce is not static, but adjusts to practical economic reality. The range of activities which Congressional power as fully exercised under the Constitution can reach is not frozen in the past but alters with changes in the nature of interstate commerce. Even if the new standard of anticompetitive power erected by the majority below is accepted, HBC has alleged a conspiracy to maintain a two-competitor market (Rex and Wake) with HBC as a small and ineffective competitor whose efforts to become an important factor in the market are thwarted by the conspiracy restraining and attempting to monopolize the relevant market. To hold such a conspiracy lacking in anticompetitive power is merely to disbelieve HBC's allegations.

II

In its operation of Mary Elizabeth, HBC is doing business in interstate commerce. The provision of hospital services by HBC, Rex, and Wake occurs in the flow of interstate commerce, defined by this Court as "the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186, 195 (1974). The practical economic continuity presented in this case begins with the purchase in interstate commerce of the goods and services necessary to provide hospital services and continues through the payment for these services by the federal

government under its Medicare and Medicaid programs and by private health insurance companies, all as ultimate purchasers of hospital services. This flow of interstate commerce resembles the interstate commerce in sales of real estate presented in *Goldfarb* where this Court emphasized the interstate financing of real estate purchases in finding such transaction frequently to be "interstate" in nature. The Raleigh Group's conspiracy restrains and attempts to monopolize an appreciable amount of interstate commerce. HBC therefore meets the requirements of the "in commerce" test of jurisdiction under the Sherman Act.

III

Without the submission of any evidence and over the objection of HBC, the District Court dismissed HBC's Complaint on the pleadings either for want of jurisdiction or failure to state a claim on which relief could be granted. HBC has not had the benefit of any discovery procedures in order for it to present all the available evidence on the interstate commerce issues. These interstate commerce issues present a question of subject matter jurisdiction, and particularly with regard to the issue of substantial effect on interstate commerce, a resolution of the question of subject matter jurisdiction is identical to a resolution of certain issues on the merits. Only in limited instances should a question of subject matter jurisdiction under the Sherman Act be resolved by summary proceedings, and even then, the proper form of summary procedure is summary judgment with its accompanying limited discovery, not dismissal on the pleadings with no submission of evidence whatsoever. Such a departure from appropriate procedure seriously prejudiced HBC's right to a fair hearing and endangers the viability of private actions as a means of enforcing the antitrust policy of the United States.

ARGUMENT

Introduction

This case presents a question of Congressional power under the Constitution. In *Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186, 194 (1974), this Court reaffirmed its prior declarations that in enacting Section 1 of the Sherman Act, Congress "wanted to go to the utmost extent of its Constitutional power . . ."[14] Since this Court has authoritatively resolved the question of Congressional intent to exert its full power in enacting Section 1 of the Sherman Act, the test of jurisdiction under the Sherman Act, however articulated, is one of Congressional power.[15] As a result, the decision below

[14] This reaffirmation is part of a discussion by this Court contrasting jurisdiction under the Sherman Act to jurisdiction under other antitrust laws and was not essential to the decision of the issues before the Court in that case:

> "The jurisdictional reach of § 1 thus is keyed directly to effects on interstate markets and the interstate flow of goods. Moreover, our cases have recognized that in enacting § 1 Congress 'wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements. . . .' *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 558 (1944). Consistently with this purpose and with the plain thrust of the statutory language, the Court has held that, however local its immediate object, a 'contract, combination . . . or conspiracy' nonetheless may constitute a restraint within the meaning of § 1 if it substantially and adversely affects interstate commerce. *E. g., Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948). 'If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' *United States v. Women's Sportswear Mfrs. Assn.*, 336 U.S. 460, 464 (1949)." *Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186, 194-195 (1974).

[15] This case does not also present questions of statutory interpretation, as did recent cases on the scope of jurisdiction under the Robinson-Patman Act (*Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186 (1974)) and under the Clayton Act (*United States v. American Building Maintenance Industries*, — U.S. —, 43 U.S.L.W. 4838 (June 24, 1975)).

constitutes a determination that Congress is without power under the commerce clause to reach the alleged conduct.

The majority below articulated the traditional formula for determining jurisdiction under the Sherman Act as follows:

> "An antitrust plaintiff may establish the necessary connection with interstate commerce in either of two ways: by demonstrating that the alleged anticompetitive conduct occurred *in* interstate commerce, or by showing that the conduct, though wholly intrastate, had a substantial *effect on* interstate commerce." (Emphasis in the original) (App. 55-56).[16]

HBC contends it has satisfied both these traditional tests of jurisdiction. The argument in this Brief with regard to the "effect on commerce" test precedes that with regard to the "in commerce" test.

I. The Raleigh Group's Conspiracy Substantially Affects Interstate Commerce.

There is no question that HBC and hospitals in general regularly engage in transactions in interstate commerce. The majority below itself stated the following as a premise it accepted:

> ". . . (1) Mary Elizabeth, and hospitals in general, have become substantially enmeshed in the interstate commerce network through their use of interstate communications facilities, their subjection to extensive federal regulation, their purchases of materials and services from out-of-state, their treatment of patients from other states, and their financial

[16] Judge Winter in dissent below observes, however, that the majority fails to follow the traditional test and instead "as its addendum demonstrates, applies a test designed for determining the jurisdictional ambit of the Clayton and Robinson-Patman Acts." (App. 67-68).

arrangements with national health insurers and government welfare programs . . ." (App. 56-57).[17]

Nor is there any question that the activities of the Raleigh Group affect these interstate transactions to some degree.[18]

In considering a similar case, the United States Court of Appeals for the Third Circuit recently commented that:

> ". . . precedent in this area is unlikely to dictate the outcome in any given case. Instead, it is more likely to communicate a general sense as to how much of an impact local activities must have upon interstate commerce before they confer jurisdiction." *Doctors Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48, 51 (3rd Cir. 1973).

Bearing this in mind, the following discussion focuses on the relevant decisions of this Court and other courts by first exploring the nature of the interstate transactions in question and then discussing the impact, as a practical matter, of the Raleigh Group's conspiracy on those transactions.[19]

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[17] The District Court below as well conceded this activity in interstate commerce:

> "These various activities show unmistakably that the plaintiff engages in transactions in interstate commerce, but it does so only incidentally to the conduct of its principal business which is that of operating a hospital in Raleigh, North Carolina." (App. 48).

[18] Neither the majority below nor the District Court below determined that there was no impact whatsoever on interstate commerce arising from the Raleigh Group's conspiracy. The District Court held the effect to be incidental and insubstantial (App. 48) while the majority below considered the effect to be indirect, fortuitous, negligible and insufficient (App. 60, 61).

[19] For ". . . [i]t is in a practical sense that we must view an effect on interstate commerce, *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905); *Mandeville Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 233 (1948)." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 784 (1975).

A. HBC and hospitals in general regularly engage in interstate transactions as an integral part of the provision of hospital services.

HBC is a provider of hospital services, both in the generic sense and within the meaning of federal statute.[20] Its business is to assemble and maintain the sophisticated equipment and staff necessary to offer first-rate hospital care to the Raleigh area. It has two competitors—Defendant Rex is a private, tax-exempt hospital, and co-conspirator Wake is a government hospital. (App. 10, 11). Together they compete for paying patients in order to generate sufficient operating revenues to stay in business. (App. 12-13).[21]

Only a small portion of patients pay directly for hospital services.[22] Instead, most patients finance the purchase of hospital services through third-party payors such as health insurance companies and the federal government through Medicare and Medicaid.[23]

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[20] For the purpose of the Medicare program, a "provider of services" as defined in 42 U.S.C. § 1395x(u) includes a "hospital" as defined in 42 U.S.C. 1395x(e).

[21] Increasingly, tax-exempt hospitals like Rex also require third-party payment, and this trend has prompted the Internal Revenue Service to revise its standards for determining the "charitable" status of tax-exempt hospitals. The controversy arising from this change is presently before this Court in *Eastern Kentucky Welfare Rights Org. v. Simon* and its companion case. (Dkt. Nos. 74-1110 and 74-1124).

[22] In the case of HBC, only 5.5% of charges for hospital services are made directly to the patient. (App. 36).

[23] At HBC, almost 95% of charges for hospital services are made to such third-party payors. (App. 36). Over 36% of HBC's charges are made to the federal government under Medicare. (App. 36). Without the benefit of any discovery procedures, HBC is not aware of the actual level of charges under Medicare submitted by its two competitors, Rex and Wake, but alleged that many of the fees charged patients by Rex and Wake are paid "by insurance

The major role of third-party payors in financing what this Court has recognized as the ". . . already astronomical costs of hospitalization which bear so heavily on the resources of most Americans"[24] is understandable. As the United States Court of Appeals for the District of Columbia noted, hospital operating costs ". . . have soared in recent years as constant modernization of equipment and facilities is necessitated by the advances in medical science and technology."[25]

This relationship with health insurance companies and with the federal government's Medicare and Medicaid programs is an integral part of hospital business. Almost 95% of its revenue flows to HBC from these third-party payors. (App. 36).[26]

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companies and other providers located outside the State of North Carolina." (App. 36).

The federal expenditures, including administrative costs, under Medicare and Medicaid are indicated below:

	1972	1973	1974
Medicare	8,363,000,000	9,090,000,000	11,410,000,000
Medicaid	4,426,000,000	4,090,000,000	4,875,000,000

(Table No. 435; Statistical Abstract of the United States—1974, U.S. Department of Commerce). Not all of these expenditures are for the purchase of hospital services. Under the Medicare program, providers like HBC seek reimbursement for hospital services to eligible patients by submitting requests for reimbursement to a fiscal intermediary. The fiscal intermediary contracts with the Secretary of H.E.W. and the provider to perform general administrative functions pursuant to 42 U.S.C. § 1395h. Fiscal intermediaries receive funds from the federal government and disburse these funds to providers, all in accordance with federal statutes and regulations governing the Medicare program. 42 U.S.C. §§ 1395g-1395h.

[24] *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 265 (1974).

[25] *Eastern Kentucky Welfare Rights Org. v. Simon*, 506 F.2d 1278, 1288 (D.C. Cir. 1974), *cert. granted*, 421 U.S. 975 (1975).

[26] This regular flow of payments across state lines contrasts sharply with the "few, sporadic, and incidental" payments across state lines by a doctor-sponsored prepaid health care plan considered by this Court in *United States v. Oregon Medical Society*, 343 U.S. 326, 339 (1952).

HBC's provision of hospital services, including its capital expenditures to expand, is pervasively regulated by the federal government.[27] Viewing the provision of hospital services in this context as a purely local activity fundamentally misconceives the nature of the transactions at issue.[28]

This flow of payments in interstate commerce is only one part of the interstate transactions which are an integral part of the provision of hospital services. In order to provide hospital services, HBC purchased over $112,000 of equipment and supplies in 1972. These purchases ranged from drugs and laboratory equipment to specialized supplies and equipment for its radiology

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[27] An especially noteworthy aspect of the Medicare program with regard to the Raleigh Group's conspiracy is the fact that the $4,000,000 expansion of Mary Elizabeth which the Raleigh Group seeks to bar as part of its overall scheme must be approved under federal regulations if HBC is to be eligible for reimbursement of these capital expenditures under the Medicare program. One element of the reimbursement formula under Medicare (which is generally designed to measure the reasonable cost of hospital services) takes into account the cost of capital expenditures such as the proposed $4,000,000 expansion of Mary Elizabeth. Unless the capital expenditure has been approved through a procedure set up by a federal statute to prevent wasteful duplication of facilities, the provider will receive no payment under Medicare for that portion of its costs. 42 U.S.C. § 1320(a)-1.

[28] The United States Department of Justice has echoed HBC's arguments in alleging trade or commerce in *United States v. The American Society of Anesthesiologists, Inc.*, Civil No. 75-4640, United States District Court, Southern District of New York (filed September 22, 1975). That complaint, alleging a price-fixing conspiracy by The American Society of Anesthesiologists, Inc. ("ASA"), singles out the flow of payments to anesthesiologists from the federal government and health insurance carriers as well as the purchases of supplies as the basis of jurisdiction under the Sherman Act. The full complaint is attached to this Brief as Appendix A. The position of HBC is also consistent with the decision of the Seventh Circuit in *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256 (7th Cir. 1975), *cert. denied sub nom Modern Asphalt Paving and Construction Co.*, — U.S. —, 44 U.S.L.W. 3205 (October 6, 1975) where the fact that a sewer project was financed in part by the United States Department of Housing and Urban Development was viewed as a significant factor in finding jurisdiction under the Sherman Act.

and electrocardiology operations. (App. 35).[29] Approximately 80% of the supplies were purchased pursuant to national contracts negotiated by HBC's out-of-state parent, Charter. (App. 35). In addition, HBC purchased management services in interstate commerce from Charter at a cost of $36,000 in 1972. (App. 35). These purchases of goods and supplies are not sporadic, nor are they a "one-shot" affair.[30] The volume of these transactions in interstate commerce is directly related to the volume of hospital services provided and would necessarily increase substantially with the expansion of HBC. (App. 35).[31] In addition, HBC, Rex, and Wake compete to serve the substantial number of out-of-state patients who come to the Raleigh area for treatment. (App. 36).[32] Finally, the expansion, mod-

[29] Congress by exempting certain sales of supplies to non-profit hospitals from the provisions of the Robinson-Patman Act has recognized that the sale of supplies, including drugs, to hospitals often occurs in the flow of interstate commerce. 15 U.S.C. § 13c. The scope of this exemption is before this Court in *Abbott Laboratories, et al. v. Portland Retail Druggists Ass'n., Inc.* (No. 74-1274).

[30] This regular and continuing set of interstate transactions differs markedly from the initial outfitting of a single bowling alley requiring a "one-shot" purchase of supplies in interstate commerce which has been held not to affect interstate commerce substantially. *Lieberthal v. North County Lanes, Inc.*, 332 F.2d 269 (2nd Cir. 1964). The Court there (at p. 272) distinguished the facts before it from the "continuous flow of plastering materials" described by this Court in *United States v. Employing Plasterers Ass'n.*, 347 U.S. 186 (1954) where this Court held the local conspiracy alleged substantially affected interstate commerce.

[31] HBC's allegations here are in contrast to those made in *Wolf v. Jane Phillips Episcopal-Memorial Medical Center*, 513 F.2d 684 (10th Cir. 1975). There the plaintiff doctor did not allege any impact on his purchases of supplies for his private practice as a result of an alleged conspiracy to exclude him from a staff position with defendant hospital, nor were there apparently any allegations as to the amount of supplies he purchased.

[32] In a number of cases finding no jurisdiction under the Sherman Act involving doctors or hospitals, the only allegation of trade or commerce considered by the court was that of an unspecified and apparently limited number of such out-of-state patients. HBC clearly does not rely on this allegation alone to justify jurisdiction in this

ernization, and relocation of Mary Elizabeth, costing more than $4,000,000, will be financed by loans with one or more out-of-state lenders, so that payments to secure building supplies and to repay the financing will cross state lines. (App. 37).

All of these interstate transactions are an integral part of the provision of hospital services. Together they constitute a substantial and continuing flow of money, goods, and services in interstate commerce which Judge Winter in dissent below described as follows:

> "Money thus flows from Blue Cross, private insurers, and the federal government to the hospital and thence to out-of-state suppliers, managers, and financiers." (App. 72).

Thus, even assuming the provision of hospital services by HBC, Rex, and Wake is a wholly-local, intrastate activity, the provision of these hospital services is an integral part of interstate transactions.

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), this Court held that a conspiracy to restrain a wholly local, intrastate service could nevertheless substantially affect interstate commerce if the local service is an *integral part* of inter-

case. *See*: *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167 (8th Cir. 1959) (the only jurisdictional allegation considered was one of an unspecified number of out-of-state patients; an allegation concerning an effect on purchases of supplies was not considered because no connection between these purchases and the conspiracy was alleged); *Spears Free Clinic and Hospital for Poor Children v. Cleere*, 197 F.2d 125 (10th Cir. 1952) (claim that hospital was "in" interstate commerce solely because of an unspecified and apparently limited number of out-of-state patients); *Nankin Hospital v. Michigan Hospital Service*, 361 F. Supp. 1199 (E.D. Mich. 1973) (treatment of a single out-of-state patient in ten years); *Winters v. Kansas Hospital Service Ass'n., Inc.*, — F. Supp. — (Kan. 1974) 1975-1 Trade Cases ¶ 60,140 (approximately 1% of patients treated at defendant hospitals were from out-of-state).

state transactions. In determining whether the service is in fact an integral part of interstate transactions, this Court analyzed whether the service provided was in a practical sense necessary to the interstate transaction. Given the inseparability of the local service from the interstate transactions, and given the required volume of interstate transactions, this Court held a restraint of local services substantially affected interstate commerce.

The interstate transactions involved in *Goldfarb* are similar to some of the interstate transactions which are an integral part of providing hospital services. In *Goldfarb*, this Court highlighted the interstate financing of real estate transactions, particularly the involvement of out-of-state lenders and the role of instrumentalities of the federal government in guaranteeing that financing. These elements of financing were the interstate aspects of real estate transactions affected by conduct "which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states." (at page 784).

In the instant case, just as out-of-state lenders and the federal government finance the purchase of real property in *Goldfarb*, health insurance companies and the federal government through the Medicare and Medicaid programs finance the purchase of hospital services from HBC, Rex, and Wake. Moreover, the provision of hospital services is not merely *ancillary* to the interstate transactions, as were the legal services in *Goldfarb*. The provision of hospital services is the *core* of these interstate transactions. The Raleigh Group's conspiracy to restrict production of hospital services in order to maintain prices at artificially high levels, to foreclose effective entry to out-of-state capital and initiative, to allocate customers and submarkets, and its attempt to monopolize a submarket for hospital services affects the essential element triggering the whole gamut of interstate

transactions ranging from provider reimbursement to the purchase of goods and services.[33]

The provision of hospital services bears a greater resemblance to a taxi trip between stations to change trains than does the provision of legal services. The critical element of continuity highlighted by this Court in *Goldfarb* in applying that analogy from *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947) is clearly present here. On one side are the out-of-state health insurance companies and the federal government; on the other, the out-of-state providers of goods and services. The provision of hospital services is the essential link between and a necessary part of these two categories of interstate transactions. Without it, these interstate transactions would not occur.

As Judge Winter stated in dissent below:

> "Under all these circumstances, I think it myopic to maintain that the service itself is rendered locally. Local patient care may be the hub of hospital operation, but the spokes—financing, supplies, management, and fee payments—all have out-of-state implications. The hub cannot be braked without affecting the spokes." (App. 72-73).

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[33] The test applied in *Page v. Work*, 290 F. 2d 323, 330 (9th Cir. 1961) is not inconsistent with the approach taken in this Brief. In *Page*, the Court stated that "[t]he test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." The Raleigh Group's conspiracy clearly affects the interstate transactions which are an integral part of providing hospital services. As in *Page*, the question of the substantiality of that effect remains, and is discussed in the following section of this Brief. In *Page*, the Court found the effects alleged were either non-existent or insubstantial.

B. **The Raleigh group's conspiracy substantially affects the interstate transactions which are an integral part of the provision of hospital services by HBC, Rex, and Wake.**

Certain obvious effects on the interstate transactions of HBC, Rex, and Wake follow logically from the scope of the alleged conspiracy:

1. Restriction of production of hospital services impedes the natural flow of supplies and services in interstate commerce to the Raleigh market and particularly the substantially increased flow of supplies and services to an expanded HBC;

2. Restriction of production suppresses the flow of payments for hospital services from out-of-state health insurers and the federal government under Medicare and Medicaid;

3. Restriction of productive capacity (i.e. number of beds) in order to maintain and fix prices at artificial levels deprives consumers of the benefits of free competition;

4. Allocation of customers and submarkets diverts the natural flow of supplies and of out-of-state payments for services from one hospital to other hospitals;

5. Foreclosure of effective entry stifles the natural flow of capital and other resources into the market; and,

6. As Judge Winter noted in dissent below:

> "Actual or attempted monopolization of the local market could have a dramatic effect, not only to decrease the flow of hospital payments, but to increase the cost of hospital care in the Raleigh area as well. If hospital care costs are increased, insurance costs will also increase, and federal and out-of-state providers will spread these increased costs beyond the local area in which they were incurred. And this is so even if the overall market for hospital care in the Raleigh area is neither increased nor diminished, but only concentrated in the hands of the hospital defendants." (App. 72).

As the dissent below states, the effects of the conspiracy on interstate commerce, taken as a whole, are substantial. (App. 69).

As this Court noted in *Goldfarb*, it is not necessary to allege or prove the specific magnitude of the effects:

> "The fact that there was no showing that home buyers were discouraged by the challenged activities does not mean that interstate commerce was not affected. Otherwise, the magnitude of the effect would control, and our cases have shown that, once an effect is shown, no specific magnitude need be proved. *E.g., United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 310 (1956)." (421 U.S. 773, 785).

This approach is consistent with previous decisions of this Court in *Burke v. Ford*, 389 U.S. 320 (1967) (*per curiam*) and *United States v. Employing Plasterers Ass'n*, 347 U.S. 186 (1954). Both cases held that an intrastate conspiracy affected interstate commerce substantially. In *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48, 53 (3rd Cir. 1973), the United States Court of Appeals for the Third Circuit described the central thrust of these two cases as follows:

> "There is no discussion of 'directness' or of the specific relationship between the interstate goods affected and the local market controlled. Nor is there even a concern with the specific magnitude of the impact on interstate commerce caused by the alleged conspiracy.

Instead, the Court in each case ends its inquiry when it has satisfied itself that the logical and therefore probable effect of the alleged act is to reduce the flow of goods in interstate commerce." (footnotes omitted).

Judge Winter in dissent below applied the reasoning of *Doctors, Inc.* to the facts of this case as follows:

"In *Doctors*, the named plaintiff purchased $233,430 in supplies from out-of-state suppliers in the test year. Although this figure does not seem to be of any greater magnitude than the projected flow alleged by the plaintiff here, the majority relies on the fact that Doctors' Hospital was typical of the approximately one hundred other hospitals in the area against all of which the conspiracy was directed, so that it could properly be inferred that interstate purchases of great magnitude were jeopardized. The distinction, however, is largely without difference. *Gulf Oil* reminds us that, in enacting § 1 of the Sherman Act, Congress was exercising to the *fullest extent* its constitutional power to restrain trusts and monopolies. Thus, it is not only the 'big' resultant restraint on interstate commerce that it outlawed; the 'little' resultant restraint on interstate commerce is outlawed too so long as a direct adverse effect on interstate commerce is demonstrated and that effect is not de minimis" (App. 70).[34]

[34] Significantly, the *de minimis* standard suggested by Judge Winter is echoed by the United States Court of Appeals for the Fifth Circuit in *St. Bernard General Hospital, Inc. v. Hospital Service Ass'n of New Orleans, Inc.*, 510 F. 2d 1121 (5th Cir. 1975). There, (after discussing its previous decision in *Lehrman v. Gulf Oil Corp.*, 464 F. 2d 26 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972) where it held the effects on interstate commerce of a local conspiracy were not "insignificant or insubstantial") the Fifth Circuit commented "[i]n other words, it was not *de minimis*." (at page 1125).

The majority below held that the conspiracy's effects on interstate commerce were insufficient to establish jurisdiction:

"The effect here seems to us the indirect and fortuitous consequence of the restraint of the intrastate Raleigh area hospital market, rather than the result of activity purposely directed toward interstate commerce. Although not controlling, this factor is relevant to the issue of substantiality. *See, e.g., Spears Free Clinic v. Cleere, supra*, 197 F. 2d at 127; *Marston v. Ann Arbor Property Managers (Management) Association*, 302 F. Supp. 1276, 1280 (E. D. Mich. 1969), *aff'd per curiam*, 422 F. 2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970)." (footnote omitted) (App. 60).

This determination, and in particular its inclusion of the purported intrastate intent of the conspiracy as a factor is in sharp contrast to, and conflicts with, the decisions of this Court and other Courts of Appeal.[35]

In *St. Bernard General Hospital, Inc. v. Hospital Service Ass'n of New Orleans, Inc.*, 510 F.2d 1121 (5th Cir. 1975) the Fifth Circuit held that the district court erred in dismissing for lack of jurisdiction a complaint alleging violations of the Sherman Act respecting the rendition of hospital services. The case was remanded to the district court for further proceedings on the question of jurisdiction as well as other questions. In analyzing the conspiracy's effects on commerce, the Fifth Circuit focused primarily on the effects the alleged con-

[35] Nowhere in the Complaint did HBC allege that the Raleigh Group purposely directed its conspiracy solely at intrastate commerce. Apparently the majority below implies such a limited intent from its reading of the objectives of the conspiracy. Aside from the inappropriateness of resolving such a question by summary proceedings, HBC submits that the objectives of the Raleigh Group and the activities undertaken to accomplish those objectives necessarily affected interstate commerce and that the logical implication is the Raleigh Group was aware of this effect and intended it.

spiracy could have on the flow of drugs and supplies in interstate commerce. The district court there had held, as did the district court in this case, "that the rendition of hospital services is a purely local activity" and that " '[w]hat is essentially an intrastate activity is not transformed into interstate commerce by reason of such purchases, and there exists no substantial effect on interstate commerce by the indirect effect of reducing prospective purchases of supplies in interstate commerce.' " The Fifth Circuit rejected this approach—the same taken by the Fourth Circuit majority in this case—saying that "we disagree with the court's purely-local-as-a-matter-of-law premise from which all conclusions, as well as the putative absence of a 'substantial effect' on interstate commerce followed." (at page 1124).[36] The Fifth Circuit's refusal to allow the question of substantial effect to be foreclosed by a holding that the services in question were purely local as a matter of law is in line with this Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), where the defendant had suggested to this Court that the proper test was whether the activity was essentially local. This Court rejected that standard as the "type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power." (at page 546).

In particular, the Fifth Circuit criticized the suggestion that the question of intrastate intent was relevant to the issue of substantial effect. The Fifth Circuit quoted from its previous decision in *Lehrman v. Gulf Oil Corp.*, 464 F. 2d 26, 36 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972), as follows:

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[36] The Fifth Circuit recognized "that the logic of *Hospital Building Co.* argues for a result contrary to that which we have reached." Nevertheless, the Fifth Circuit did not consider its decision to be in direct conflict with the decision in *Hospital Building Co.* (at page 1125). We submit, however, that the cases cannot be distinguished.

"The focus of the Act is to protect interstate trade from interferences of all degrees of subtlety. The concept of interstate commerce is a practical one. The interstate nerves of a local business can be deadened swiftly by a conspiracy the object of which happens to be the intrastate aspect of a plaintiff's business. We see no reason why the federal courts should confine themselves to protecting against interferences with interstate commerce which, quite fortuitously, turn out to have motivated the actions of a defendant. It is the effect on commerce that determines federal jurisdiction under the Sherman Act and not any notion of the 'interstate culpability' of those who engage in anticompetitive practices. No matter how intrastate the objects of anticompetitive conspirators, they must take their victims' involvement in interstate commerce as they find them." (at page 1124).

The approach taken by the Fifth Circuit is a sound one. The reach of Congressional power under the commerce clause should not be determined by the intent of conspirators to affect interstate commerce. Instead the focus should be on the *impact* of the conspiracy and thus on the actual burden on interstate commerce arising from the conspiracy. In determining the logical and therefore probable effect on interstate commerce of an anticompetitive conspiracy, it is appropriate to determine the potential scope of the conspiracy by ascertaining the objectives of the conspirators Once the objectives are determined and their probable impact on interstate commerce measured, however, it is inappropriate to discount that impact because it was in some sense unintended. Discounting an objective effect on interstate commerce because of the subjective intent of the conspirators makes the reach of Congress under the commerce clause a function of "interstate culpability" and introduces into the jurisdictional inquiry serious questions of proof. Certainly no intent factor is relevant in applying the "in commerce" test of Congressional power exerted in the Sherman Act. Just as no

specific magnitude of the effect need be alleged or proved, there should be no requirement that the effects alleged and proved be the result of conduct "purposely directed toward interestate commerce".

In determining that the substantiality of an effect on interstate commerce was lessened or eliminated by the fact the conspiracy was not "purposely directed toward interstate commerce" (App. 60), the majority below cited *Spears Free Clinic v. Cleere*, 197 F. 2d 125, 127 (10th Cir. 1952). That decision's reliance on intrastate intent was persuasively attacked by the Third Circuit in *Doctors, Inc.* as follows:

> ". . . the opinion even when it was written placed primary reliance on a series of cases that were no longer valid. These cases looked to the intent of the conspiracy alleged in order to determine whether the purported effects on interstate commerce conferred jurisdiction. If the aim of the conspiracy was to obstruct interstate commerce, it was said to have a 'direct' effect and jurisdiction was present. If the goal was otherwise, the effect was termed 'indirect' and there was no jurisdiction. This 'direct-indirect' test had been abandoned by the Supreme Court in the early 1940's. As a result, the reasoning of the opinion rested on flawed grounds even when it was issued in 1952." (at page 52).

The Third Circuit thus recognized that this Court long ago limited whatever force its previous cases considering intrastate intent material to the issue of jurisdiction under the Sherman Act may have had:

> "It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce. The cases relied upon by respondents fall within this category. All of them involved the application of the Anti-Trust laws to combinations of businessmen or workers in labor disputes, and not to interstate commercial transactions." *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 297 (1945) (footnotes omitted).

In *Goldfarb*, this Court neither considered nor discussed the intent of the conspiracy to affect interstate transactions in real estate. As the majority for the Fourth Circuit had noted in its opinion below in *Goldfarb* "[t]here is, of course, no allegation that the attorneys conspired for the express purpose of restraining the trade or commerce of those engaged in the real estate industry." (497 F. 2d 1, 15). Thus, this Court in *Goldfarb* held that a local conspiracy with apparently local intent could nevertheless substantially affect interstate commerce.

After first discounting the impact on interstate commerce as a result of the presumed intrastate intent of the Raleigh Group's conspiracy, the majority below failed to assess the substantiality of that impact on the flow of interstate commerce but instead mistakenly measured the substantiality of that impact on the interstate suppliers of goods and services themselves and on the market price of the interstate goods and services.[37] In the process, the majority below also considered the impact growing out of only one phase of the conspiracy, the delay of Mary Elizabeth's expansion, instead of the impact of the entire conspiracy to restrict production, allocate customers, and foreclose effective entry.

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[37] "Moreover, when the various economic consequences are sorted out and considered in the perspective of their respective markets, it is obvious that none of them could have more than negligible impact: no source of supply or insurance company or lending institution can be expected to go under if Mary Elizabeth doesn't expand, and no market price likely will be affected." (footnotes omitted) (App. 60-61).

It will be rare indeed for a conspiracy occurring wholly intrastate to threaten the economic viability of some national supplier of goods and services. If this were the test of substantial effect, the conspiracies before this Court in *Goldfarb*, *Employing Plasterers*, and *Burke v. Ford* could not have passed muster. Such a standard effectively shields local conspiracies not occurring in interstate commerce from the reach of Congressional power exercised under the Sherman Act. Instead, the inquiry should focus on the impact the conspiracy has on the flow of goods and services in interstate commerce. If that flow is "reduced or altered" or "diminished" to a substantial degree, the conspiracy comes within the reach of Congressional power.[38] Just as no specific magnitude of the effect need be shown, no specific impact on a market price or on a supplier should be required.

Stating its dissatisfaction with its own analysis, the majority below attempted to construct a rational framework for resolving questions of substantial effect based upon a notion of "anti-competitive power." (App. 62, 64).[39] Apparently fearing that

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[38] The Fifth Circuit in *St. Bernard General Hospital, Inc. v. Hospital Service Ass'n of New Orleans, Inc.*, 510 F. 2d 1121, 1125 (5th Cir. 1975) reaffirmed its prior statement that "the requisite effect is nonetheless accomplished by 'a reduced or altered flow of goods into the State . . . from without the state.' " The Ninth Circuit in *Rasmussen v. American Dairy Association*, 472 F. 2d 517, 525 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973) noted that the conspiracy alleged there would diminish the flow of ingredients in interstate commerce and held the conspiracy subject to the Sherman Act.

[39] The majority below is not alone in expressing impatience with verbal formulae as a guide to resolving jurisdictional questions under the Sherman Act. Catchwords provide little guidance to businessmen or judges in resolving these issues. The Third Circuit for instance noted with regard to the effect on commerce test:

> "When courts do speak in terms of a test, the formulations used are, of necessity, so broad and generalized that instead of providing a guide to the solution of the problem they do no more than restate the issue." *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 490 F. 2d 48, 51 (3rd Cir. 1973).

See also Justice Jackson's comment that "the term 'direct' [as applied to effects on commerce] was used for the purpose of stating, rather than of reaching, a result . . ." *Wickard v. Filburn*, 317 U.S. 111, 122-123 (1942).

the increasing "inter-dependence of all segments of our national economy" would bring within the scope of the Sherman Act a new and ever-expanding range of local conduct, the majority below focused on the "evil of monopoly power" as the driving force behind the Sherman Act. (App. 62, 63). In essence, the majority below requires that a local conspiracy must attain monopoly power in the local market before a victim can successfully demonstrate a substantial effect on interstate commerce for purposes of jurisdiction under the Sherman Act. Yet as Judge Winter in dissent below observes:

> "In the Sherman Act, not only the 'evil of monopoly power', but the evil of improper attempts to achieve it are condemned." (App. 71-72).

Unreasonable restraints under Section 1 of the Sherman Act can occur long before monopoly power is established or even sought in violation of Section 2. Whatever limits there should be to a possible expansion of the range of activities subject to the Sherman Act as an outgrowth of increasing economic interdependence, a standard requiring monopoly power in a local market in order for a conspiracy substantially to affect interstate commerce is far too restrictive.

Even if the test applied by the majority below were accepted, however, HBC has clearly alleged the kind of anticompetitive power in the local market which the majority requires. Not only has HBC alleged a conspiracy by its only two competitors to restrict production in order to maintain and fix prices at an artificial level, to allocate customers, and to foreclose effective entry, HBC also alleged an attempt by Rex to monopolize a

two-competitor submarket (Rex and HBC) for hospital services. As detailed above at page 28 of this Brief, the Raleigh Group's conspiracy extended beyond attempts merely to delay the expansion of Mary Elizabeth. Judge Winter noted in dissent below:

> "In essence the plaintiffs allege that a local conspiracy was able to forestall out-of-state entry into the local hospital market. If by means of conspiracy and harassment those who hold a local market can foreclose or limit the entry of competition, capital, and initiative from out-of-state, then it seems to me that the federal interest in interstate commerce is directly involved. To conclude, as the majority does, that the plaintiffs here do not allege the kind of anticompetitive power which 'Congress sought to guard against' is merely to disbelieve the plaintiff's allegations." (App. 71).

In a practical sense, the Raleigh Group's conspiracy affects interstate commerce in a substantial way.

II. The Raleigh Group's Anticompetitive Conduct Occurred in Interstate Commerce.

In its operation of Mary Elizabeth, HBC is doing business in interstate commerce. (App. 37). As this Court has stated with regard to the "in commerce" aspect of the Clayton Act:

> "To be engaged 'in commerce' within the meaning of § 7, a corporation must itself be directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce." *United States v. American Building Maintenance Industries*, — U.S. —, 43 U.S.L.W. 4838, 4842 (June 24, 1975).

As already discussed at page 21 of this Brief, HBC purchases goods and services in interstate commerce. In addition, the provision of hospital services itself occurs in the flow of interstate commerce which this Court has defined as "the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186, 195 (1974). In the instant case, just as out-of-state lenders and the federal government financed a significant portion of the purchases of real property in *Goldfarb*, health insurance companies and the federal government through Medicare and Medicaid finance a significant portion of the purchases of hospital services in the Raleigh market. Emphasizing the interstate financing of real estate purchases in *Goldfarb*, this Court held such purchases frequently to be "interstate transactions":

> "As the District Court found, 'a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia,' and 'significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development, both headquartered in the District of Columbia.' Thus in this class action the transactions which create the need for the particular legal services in question frequently are interstate transactions." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783 (1975) (footnotes omitted).

As the decision of this Court in *Goldfarb* recognizes, the concept of interstate commerce is not static but adjusts to the reality of the market place. *Swift and Co. v. United States*, 196 U.S. 375 (1905). In economic reality, the ultimate purchasers of hospital services today, as clearly shown in this case, are (i) private health insurance companies and (ii) the federal government under its Medicare and Medicaid programs. The days when an individual receives from and pays the provider for hospital services out of his own pocket are over. The flow of

interstate commerce begins with the purchase in interstate commerce of the goods and services necessary to provide hospital services and continues through the payment for these services by such ultimate purchasers. This practical economic continuity constitutes a flow of interstate commerce.

The majority below, misconceiving the nature of the transactions in question, held:

> "The provision of hospital services has consistently been held to be a purely local activity. *Elizabeth Hospital, Inc. v. Richardson*, 269 F. 2d 167, 170 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Spears Free Clinic v. Cleere*, 197 F. 2d 125, 126 (10th Cir. 1952)." (App. 56).

In so holding the majority below relied on two decisions in which the only allegation considered by either court supporting jurisdiction related to an unspecified number of out-of-state patients which used or might use the hospital in question. The meager allegations regarding jurisdiction considered by the Courts of Appeal in both *Elizabeth* and *Spears* severely restrict their applicability here where HBC alleged numerous other facts showing its place in the flow of interstate commerce. In addition, the majority below failed to consider that both *Elizabeth* and *Spears* were decided before the advent of federal financing and regulation of hospital services under Medicare and Medicaid and the expansion of health insurance companies.[40]

In *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), this Court faced a similar issue. The business of insurance had not been viewed previously as "commerce". This Court, in a landmark decision, acknowledged the vital importance of insurance to each citizen and the growth of a nationwide network in insurance which had developed as a practical economic matter over the years. This Court held the business of insurance to be "commerce" within the meaning of the Sherman Act and subject to jurisdiction under the Sherman Act because it was in the flow of interstate commerce. In explaining this decision, this Court stated:

> "Premiums collected from policyholders in every part of the United States flow into these companies for investment. As policies become payable, checks and drafts flow back to the many states where the policyholders reside. The result is a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts . . . The decisions which that company makes at its home office—the risks it insures, the premiums it charges, the investments it makes, the losses it pays—concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state." (pp. 541-542).

It is precisely this inter-relationship between the cost of hospital services rendered in local markets such as the Raleigh area and both (i) the premiums paid by policyholders of private health insurance companies and (ii) the expenditures of the federal government under Medicare and Medicaid to which Judge Winter, dissenting below, referred as follows:

> "If hospital care costs are increased, insurance costs will also increase, and federal and out-of-state providers will spread these increased costs beyond the local area in which they are incurred." (App. 72).

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[40] As the instant case makes clear, it will be difficult for hospitals seeking effectively to enter or expand within a market to meet the jurisdictional requirements under the "effect on commerce" test as prescribed by the Fourth Circuit. Consequently, the federal government as the ultimate purchaser of a vast amount of these services will be virtually unprotected by the Sherman Act from conspiracies to foreclosure effective entry and to monopolize such markets.

It is important that this Court limit *Elizabeth* and *Spears* to their own economic era and their own facts in order to adjust the concept of interstate commerce to meet the new circumstances in the market for hospital services as presented in this case.

Instead of following *Spears* and *Elizabeth*, the majority below should have adopted the view of the "in commerce" test stated by the United States Court of Appeals for the Ninth Circuit in *Rasmussen v. American Dairy Association*, 472 F. 2d 517 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973):

> ". . . [T]he power of Congress over commerce among the states is not a 'technical legal conception,' divorced from economic reality. *See United States v. South-Eastern Underwriters Ass'n, supra*, 322 U.S. at 547, 64 S. Ct. at 1170. . . . As Justice Cardozo noted in his dissent in *Carter v. Carter Coal Co.*, 298 U.S. 238, 328, 56 S.Ct. 855, 880, 80 L.Ed. 1160 (1936), the words and phrases used to define the commerce power must be interpreted 'with suppleness of adaptation and flexibility of meaning. The power is as broad as the need that evokes it.' Whether the requisite 'substantial economic effect' or 'substantial relation to the national interest' is present or absent is a practical, case-by-case economic judgment, not a conclusion derived from application of abstract or mechanistic formulae." (footnotes omitted) (at p. 523).

The decision of the majority below in holding the provision of hospital services to be purely local, intrastate commerce is inconsistent with the decisions of this Court and with the approach articulated in *Rasmussen*. There is an appreciable amount of interstate commerce involved. The Raleigh Group's conspiracy restrained that commerce. HBC therefore meets the requirements for jurisdiction under the Sherman Act as measured by the "in commerce" test.

III. Dismissal of HBC's Complaint on the Pleadings Was Inappropriate.

Without any discovery and without the submission of any evidence, the District Court below dismissed HBC's Complaint either for want of jurisdiction or for failure to state a claim on which relief can be granted. HBC has consistently argued that resolution of the question of the necessary nexus with interstate commerce by summary proceedings is inappropriate. This objection was first raised in HBC's Brief in Opposition to Defendants' Motions to Dismiss for Lack of Jurisdiction. (App. 41). HBC has not had the benefit of any discovery procedures in order for it to present all the available evidence concerning the interstate commerce issues.

It is not clear in the order of the District Court (App. 46) whether HBC's Complaint was dismissed on the pleadings for failure to state a claim or for want of jurisdiction.[41] The majority below held, however, that the Complaint was properly dismissed for failure to state a claim upon which relief can be granted. (App. 54). In so holding, the majority below is in conflict with governing decisions of this Court. *See Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186, 203 fn. 19 (1974); *United States v. Employing Plasterers Ass'n*, 347 U.S. 186 (1954); *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); 5 J. Moore, Federal Practice ¶ 38.36 [2.-2], p. 299 (2d ed. 1974). The question of the required nexus with interstate commerce under the Sherman Act is a question of subject matter jurisdiction, and frequently the resolution of that question is identical with the resolution of certain issues on the merits (particularly the issue of substantial effect on interstate commerce). As noted by Justice Douglas dissenting in *Copp Paving Company, Inc.* "if the jurisdictional issue is closely intertwined with or dependent on the

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[41] The Raleigh Group's motions to dismiss raised both these grounds. (App. 29, 31, 39).

merits of the case, the preferred procedure is to proceed to a determination of the case on the merits. *McBeath v. Inter-American Citizens for Decency Comm.*, 374 F. 2d 359, 362-363 (CA5), *cert. denied*, 389 U.S. 896 (1967); *Jaconski v. Avisun Corp.*, 359 F. 2d 931, 935-936 (CA3 1966)." (fn. 10 at page 213).

In certain limited situations, the issue of subject matter jurisdiction under the Sherman Act may be resolved by summary proceedings. Where the plaintiff or counterclaimant has not objected to such summary proceedings and has had an opportunity to present all available evidence concerning the interstate commerce issues, resolution of the jurisdictional dispute may, in the sound discretion of the District Court, be undertaken through summary procedures.[42] Nevertheless, the proper procedure to follow is a summary judgment procedure, not a dismissal on the pleadings alone.[43] The majority below made passing reference to the appropriateness of summary judgment procedure but failed to remand with instructions to follow that procedure:

> "Our task would be much simpler had the district court converted the motion to one for summary judgment as authorized by the last sentence of Rule 12(b). Such a course would doubtless have involved the district court and counsel in limited discovery procedures, but we think the extra time and effort would have been worthwhile." (App. 53-54).

Not only is such an approach "worthwhile," it is required.[44]

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[42] *Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186, 203 fn. 19 (1974).

[43] *Ibid.*

[44] It will be little comfort to victims of anticompetitive conspiracies to note that the majority below termed its sanctioning of this departure from appropriate procedure "a rare exception to prove the rule that judgments of dismissal on the pleadings in antitrust cases will ordinarily be dismissed." (App. 54).

As Judge Winter noted in dissent below:

> "In my view, this amended complaint may not be dismissed *on the pleadings*. Of course, I express no view as to whether the jurisdictional allegations can be proved, but plaintiff should be afforded the opportunity to establish them, if not at trial, at least by a *prima facie* showing to defeat any motion by defendants for summary judgment." (Emphasis in original) (App. 65).

The decision of the majority below affirming a dismissal of HBC's Complaint on the pleadings over HBC's objection and without affording any opportunity for discovery to ascertain all available evidence on the interstate commerce issues is unwarranted and seriously weakens the effectiveness of the private action under Section 4 of the Clayton Act as a means of enforcing the antitrust policy of the United States.[45] Such a departure from appropriate procedure should not be sanctioned by this Court.

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[45] This Court has frequently recognized the vital role played by such private actions in enforcing the antitrust laws. *Perma-Life Mufflers v. International Parts Corp.*, 392 U.S. 134 (1968); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947).

CONCLUSION

The decision of the majority below should be reversed, and this action should be remanded for trial on the merits.

Respectfully submitted

JOHN K. TRAIN, III

TIMOTHY S. PERRY

ROBERT W. MILLER
1200 C&S National Bank Building
Atlanta, Georgia 30303

JOHN R. JORDAN, JR.
1414 Branch Banking & Trust
Company Building
Raleigh, North Carolina 27602

November 19, 1975

APPENDIX

APPENDIX A TO BRIEF FOR PETITIONER

United States District Court
Southern District of New York

United States of America,
Plaintiff,
v.
The American Society of Anesthesiologists, Inc.,
Defendant.
Civil No. 75-4640

Filed: September 22, 1975

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above-named defendant and complains and alleges as follows:

I

Jurisdiction and Venue

1. This complaint is filed under Section 4 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 4), commonly known as the Sherman Act, in order to prevent and restrain the continuing violation by the defendant, as hereinafter alleged, of Section 1 of said Act (15 U.S.C. § 1).

2. The defendant is found within the Southern District of New York.

II

Defendant

3. The American Society of Anesthesiologists, Inc., (hereinafter referred to as "ASA") is made the defendant herein. ASA is a corporation organized and existing under the laws of the State of New York, with its principal place of business in Park Ridge, Illinois. ASA is an association of physicians engaged in the business of providing anesthesia services to the public. Such persons become members of the ASA by joining component societies which are active in 48 states, the District of Columbia and the Commonwealth of Puerto Rico. The component societies control the ASA through the election of delegates and directors who govern ASA and determine its policies.

III

Co-Conspirators

4. Various other persons, firms, organizations and corporations not made defendants herein, participated as co-conspirators in the violation hereinafter alleged and performed acts and made statements in furtherance thereof. Such co-conspirators include, among others, component societies and members of ASA.

IV

Trade and Commerce

5. Anesthesiologists are licensed physicians who specialize in inducing a state of anesthesia, usually in connection with the performance of surgery in a hospital. There are approximately 12,200 anesthesiologists in the United States, over 90 percent of whom are members of ASA. Anesthesiologists are generally

engaged in the private practice of medicine, deriving their income from fees charged directly to the patient. Members of ASA realize annual revenues in excess of $675 million.

6. A substantial portion of the fees charged patients by members of ASA are paid directly or indirectly by health insurance carriers. The fees charged by members of ASA for their services have a direct and substantial effect upon the payments made and upon the premiums charged by health insurance carriers. The businesses which provide health insurance operate in interstate commerce and there is a substantial movement of monies in interstate commerce pursuant to the terms of health insurance policies.

7. Pursuant to the "Health Insurance for the Aged Act," 42 U.S.C. § 1395, commonly referred to as the "Medicare" program, substantial payments are made by the United States Treasury across state lines through insurance carriers acting as intermediaries, to anesthesiologists located throughout the United States.

8. Pursuant to the "Grants to States for Medical Assistance Programs," 42 U.S.C. § 1396, commonly referred to as the "Medicaid" program, substantial payments are made to anesthesiologists located throughout the United States by state governments from funds received across state lines from the United States Treasury.

9. Substantial quantities of drugs and equipment ultilized by anesthesiologists in providing their services are regularly sold and shipped to hospitals in a continuous and uninterrupted flow of interstate commerce by manufacturers and suppliers located in various states, including states other than those in which such drugs and equipment are utilized.

V

Violation Alleged

10. For many years up to and including the date of the filing of this complaint, the defendant and co-conspirators have been engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act. Said violation is continuing and will continue unless the relief hereinafter prayed for is granted.

11. The unlawful combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendant and co-conspirators to raise, fix, stabilize, and maintain fees charged by members of the defendant for rendering anesthesia services.

12. In furtherance of and in effectuating the aforesaid combination and conspiracy the defendant and co-conspirators have done the things which, as hereinbefore alleged, they agreed and conspired to do, including, among other things, adopting, publishing and circulating relative value guides or schedules which are used by members of ASA in determining fees charged for anesthesia services and which assign specific values to particular procedures.

VI

Effects

13. The aforesaid combination and conspiracy has had the following effects, among others:

(a) fees for the sale of anesthesia services by members of the ASA have been raised, fixed, stabilized, and maintained at artificial and noncompetitive levels;

(b) price competition in the provision of anesthesia services by the members of the ASA has been restrained; and

(c) purchasers of anesthesia services have been denied the right to obtain such services at competitively determined fees.

Prayer

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that the defendant and co-conspirators have engaged in an unlawful combination and conspiracy in restraint of the aforesaid trade and commerce in violation of Section 1 of the Sherman Act.

2. That the defendant, its officers, directors and agents, and all other persons acting or claiming to act on its behalf, be enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining, or renewing the combination and conspiracy hereinbefore alleged, or from engaging in any other combination, conspiracy, contract, agreement, understanding or concert of action having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

3. That the defendant, its officers, directors and agents, and all other persons acting or claiming to act on its behalf, be enjoined and restrained from promulgating, adopting or disseminating any guide or schedule concerning fees or from making any recommendations regarding the calculation of fees to be charged by members.

4. That the plaintiff have such other, further, general and different relief as the case may require and the Court may deem just and proper under the circumstances.

5. That the plaintiff recover its taxable costs.

JOHN SIRIGNANO, JR.
ELLEN R. AGRESS
EDWIN WEISS
ERWIN L. ATKINS
Attorneys,
Department of Justice
Antitrust Division
Room 3630
26 Federal Plaza
New York, New York 10007

/s/ THOMAS E. KAUPER
Assistant Attorney General

/s/ BADDIA J. RASHID

/s/ WILLIAM E. SWOPE
BERNARD WEHRMANN
Attorneys,
Department of Justice

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1452

HOSPITAL BUILDING COMPANY,
Petitioner,

vs.

TRUSTEES OF REX HOSPITAL, A CORPORATION, JOSEPH BARNES, GEORGE STOCKBRIDGE, and RICHARD URQUHART, JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS

RAY S. BOLZE
JOHN R. FORNACIARI
MARK W. PENNAK
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

THOMAS W. STEED, JR.
ALLEN, STEED & PULLEN
P.O. Box 2058
Raleigh, North Carolina 27602

JOHN H. ANDERSON
SMITH, ANDERSON, BLOUNT & MITCHELL
P.O. Box 750
Raleigh, North Carolina 27602

LILLARD MOUNT
HOFFLER, MOUNT, WHITE & LONG
102 East Main Street
Durham, North Carolina 27701

Attorneys for Respondents

December 22, 1975

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1452

HOSPITAL BUILDING COMPANY,
Petitioner,

vs.

TRUSTEES OF R[illegible]X HOSPITAL, A CORPORATION, JOSEPH BARNES, GEORGE STOCKBRIDGE, and RICHARD URQUHART, JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS

QUESTION PRESENTED

This is a private antitrust action initiated by petitioner alleging violations of Sections 1 and 2 of the Sherman Act and seeking treble damages and injunctive relief. The court below, sitting *en banc*, affirmed dismissal of petitioner's complaint, as amended, for failure to satisfy the interstate commerce jurisdictional requirements of the Sherman Act.

The sole question presented is whether the well pleaded facts alleged in petitioner's complaint, as amended, satisfy the interstate commerce jurisdictional requirements of Sections 1 and 2 of the Sherman Act.

Contrary to petitioner's arguments (Br. at 16 and 20),[1] this case does not present a question of the legislative power of Congress under the Commerce Clause, Article I, § 8, cl. 3, and affirmance of the result below will in no way limit the legislative power of Congress under the Commerce Clause. This case involves only a determination as to the sufficiency of the specific facts alleged in the complaint and amendment thereto, as measured against the well established standards for jurisdiction under Sections 1 and 2 of the Sherman Act. (*See infra* pp. 12-21.

STATEMENT OF THE CASE

A. The Facts Alleged by Petitioner

In its complaint, petitioner concludes that respondents conspired to "fix, maintain and allocate" the number of hospital beds in Raleigh, North Carolina, to "allocate customers and submarkets" among themselves and to "foreclose the market" against petitioner and "prevent" petitioner "from competing for an expanded share" of hospital services in Raleigh, North Carolina. (App. at 15.)[2] The allegations of fact in support of the conclusionary complaint assertions relate to respondents' alleged conspiracy to oppose petitioner's application to expand the facilities of Mary Elizabeth Hospital in Raleigh, the appeal by certain co-conspirators from the order granting petitioner's application for expansion, and respondents' alleged attempts to create publicity adverse to petitioner in Wake County, North Carolina. In answer to questions from the district court during oral

[1] Brief of petitioner is referred to herein as "Br."

[2] The Single Appendix is referred to herein as "App."

argument, counsel for petitioner made clear that the subject of petitioner's complaint was the "thwarting" by respondents and co-conspirators of petitioner's planned expansion of its hospital facilities in Raleigh, North Carolina. (App. at 43-44.)

1. *The Parties*

Petitioner Hospital Building Company is a North Carolina corporation "organized for profit" and operates Mary Elizabeth Hospital in Raleigh, North Carolina. (App. at 10.) Mary Elizabeth Hospital is a hospital engaged in "offering general medical-surgical hospital services to the public" for profit. (App. at 10).

Respondent Trustees of Rex Hospital ("Rex") is a public, non-profit, tax-exempt hospital located in Raleigh, North Carolina, whose trustees are appointed by the city council of the City of Raleigh, subject to approval of the senior resident judge of the Wake County Superior Court. Rex is engaged in offering "general medical-surgical hospital services to the public in Raleigh, North Carolina." (App. at 10.) Respondent Joseph Barnes is the administrator of Rex, and respondent Richard Urquhart is a member of the board of trustees of Rex. Both men are local residents of Raleigh, North Carolina. (App. at 10 and 11.) Respondent George Stockbridge is an officer of the Health Planning Council for Central North Carolina, and is a resident of Durham, North Carolina. (App. at 11.)

2. *The Conduct Complained of*

In this action, filed pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26), petitioner seeks damages in excess of $2 million and injunctive relief for alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The complaint specifically alleges the claimed conspiracy had the effect

of restraining the provision of "*additional* medical-surgical hospital services" (App. at 24-25; emphasis added) planned to be provided by the expansion of Mary Elizabeth Hospital in the "Raleigh area," expressly defined as "the area comprising Wake County in the State of North Carolina." (App. at 12.)

In 1971, petitioner alleges it planned to relocate and expand Mary Elizabeth Hospital from a forty-nine bed facility to a one hundred and forty bed facility. (App. at 18.) Pursuant to then effective North Carolina law,[3] any person that desired to increase the number of hospital beds in North Carolina was required to apply for a "Certificate of Need" from the North Carolina Medical Care Commission ("the Commission"), a state agency. (App. at 16.)

On November 4, 1971, petitioner applied to the Commission for a Certificate of Need, "for the construction of 91 additional medical-surgical beds." (App. at 18.) Pursuant to the Certificate of Need Law, petitioner's application was referred to the Health Planning Council for North Carolina ("The HPC") for its recommendations on the application. (App. at 18.)

Petitioner alleges that respondent Rex and alleged unnamed co-conspirator Wake Memorial Hospital ("Wake")[4] and other respondents and alleged co-conspirators had "caused the Health Planning Council for Central North Carolina to become a means" for furthering the alleged conspiracy (App. at 16) by defeating petitioner's application for expansion before the Commission (App. at 17), by obtaining approvals on applications for expansion by Rex and Wake, and by taking "all steps necessary to prevent" petitioner "from utilizing its Certificate of Need, including baseless and unwarranted actions before courts, county and municipal authorities and other administrative agencies in the name" of HPC. (App. at 17.)[5]

[3] The "Certificate of Need" law, Sections 90-289, *et seq.*, Title 21, General Statutes of North Carolina, has since been declared unconstitutional under the Constitution of North Carolina by the North Carolina Supreme Court. *See In the Matter of Certificate of Need for Aston Park Hospital*, 282 N.C. 542, 193 S.E.2d 729 (S.Ct.N.C. 1973).

[4] Wake Memorial Hospital is located in Raleigh, North Carolina. (App. at 11.)

The complaint alleges that respondent Rex and alleged co-conspirator Wake conspiratorially filed bad faith oppositions to petitioner's application before the HPC, and respondents and co-conspirators conspired to cause and caused the HPC to file a negative recommendation on petitioner's application with the Commission. (App. at 19.) Such negative "recommendation was intended to and did delay and forestall the capacity of plaintiff [petitioner] to compete effectively in the Raleigh area." (App. at 19.)

Subsequently, on February 27, 1972, the Commission held a hearing on petitioner's application for an additional ninety-one beds. (App. at 19.) Allegedly, in furtherance of the conspiracy, the HPC appeared before the Commission and opposed petitioner's application. (App. at 19.) It is alleged that, as part of the purported conspiracy, respondent Rex and Wake requested the Commission to continue the hearing on petitioner's application, so that they could present additional evidence. (App. at 20.) The Commission continued its hearing on petitioner's application to June 12, 1972,

[5] The Complaint alleges the conspiracy between respondent Rex and Wake was formed in 1970 with the formation of the Joint Long Range Hospital Committee, which published a report concerning the provision of additional hospital services in Wake County. (App. at 15-16.) Allegedly, the object of the conspiracy was to allocate the purported market for hospital services between Rex and Wake "to the exclusion of Plaintiff [petitioner]." (App. at 16.) Petitioner does not allege that any act, other than publication of a report, was undertaken under the aegis of the Joint Long Range Planning Committee.

at which time respondent Rex presented evidence in opposition to the application. (App. at 20.)

The Medical Care Commission approved petitioner's application on June 30, 1972. (App. at 21.) As part of the alleged conspiracy, HPC appealed the order of the Commission approving petitioner's Certificate of Need to the Superior Court of Wake County. (App. at 23.) Petitioner concedes this appeal was dismissed in February 1973, after the decision of the North Carolina Supreme Court invalidating the Certificate of Need Law. (Br. at 9.)

In its Brief (Br. 9, n.11), petitioner does not deny that neither petitioner nor respondents nor any other person obtained a stay of the Commission's approval of petitioner's application to expand. Petitioner alleges only that HPC appealed the Commission's approval. Petitioner could have initiated its expansion of Mary Elizabeth on June 30, 1972, particularly because such appeal was allegedly "without basis in law and fact." (App. at 23.)

The complaint, filed on October 10, 1972, asserts that the alleged conspiracy continued, citing as factual support the then pending appeal of petitioner's approval for expansion (App. at 23), Rex' application for expansion of its facilities by 109 beds (App. at 22), and the alleged adverse publicity generated by Rex and Wake which was created by statements that Rex and Wake could meet the future hospital service needs of Wake County. (App. at 24.) Petitioner does not allege the manner in which such statements evoked adverse publicity against it or prevented it from initiating its construction. Petitioner alleges that the State of North Carolina estimated an additional 409 beds were needed in Wake County. (App. at 19.) Therefore, Rex' application for a one hundred and nine bed expansion, according to the complaint allegations, did not prevent petitioner from

initiating its expansion. The vehicle by which respondents allegedly effectuated their alleged conspiracy, the Certificate of Need Law, has been invalidated.

3. *The Product and Geographic Markets in Which the Alleged Conspiracy Occurred*

Petitioner's complaint is clear that the conduct complained of, the alleged conspiracy to prevent the expansion of Mary Elizabeth Hospital, was directed at and affected only the provision of *additional* hospital services by Mary Elizabeth Hospital in the "Raleigh area," defined in the complaint as "Wake County, in the State of North Carolina." (App. at 12.) Count I of the complaint alleges that respondents engaged in a ". . . conspiracy in unreasonable restraint of the . . . trade and commerce in the furnishing of medical-surgical hospital services . . . ." (App. at 14.) Count II alleges that the purported conspiracy was undertaken at the direction and instigation of respondent Rex and "such acts constitute an attempt by defendant [respondent] Rex to monopolize and to conspire . . . to attempt to monopolize, the paid hospital business . . . in the Raleigh area. . . ." (App. at 26.)

It is alleged that the effect of the conduct complained of was ". . . to prevent and restrain competition in the furnishing of *additional* medical-surgical hospital services to the public . . ." (App. at 24; emphasis added) and to delay petitioner ". . . from proceeding with construction of the additional medical-surgical hospital beds. . . ." (App. at 25.) The alleged illegal acts and the hospital services affected thereby were all geographically limited to Wake County. (App. at 12 and 24-25.)

The only business allegedly carried on by Mary Elizabeth Hospital is the provision of hospital services in Raleigh, North Carolina. Moreover, the conduct complained of was allegedly directed at only that business.

B. Proceedings in the District Court and the Court of Appeals

On January 2, 1973, respondents, pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure, filed motions and supporting memoranda to dismiss the complaint for lack of subject matter jurisdiction. Petitioner, on January 29, 1973, filed a detailed factual amendment to the jurisdictional allegations of its complaint. (App. at 34-38.)

Respondents filed amendments to their motions to dismiss, and oral argument was held on February 22, 1973, in the Raleigh Division of the Federal District Court for the Eastern District of North Carolina. During oral argument, petitioner advised the district court that it had amended its complaint to be conclusive with respect to the jurisdictional requirements under the Sherman Act. (Transcript before District Court, Civil No. 4048, February 22, 1973, at p. 26, quoted *infra* at p. 52, n. 37.)

On March 23, 1973, the district court entered its order granting respondents' motions to dismiss, and stating: "the conduct of defendants [respondents] complained of in this case directly affects only a local activity of the plaintiff [petitioner] and only incidentally and insubstantially does it affect interstate commerce." (App. at 48-49.)

Upon appeal by petitioner, the United States Court of Appeals for the Fourth Circuit, on February 6, 1974, affirmed *per curiam* the order of the District Court. (App. at 50.) On June 11, 1974, the Fourth Circuit Court of Appeals granted petitioner's application for a rehearing *en banc* and withdrew its prior opinion. (App. at 51.)

After submission of supplemental briefs and oral argument, the court below sitting *en banc* again affirmed dismissal of petitioner's complaint. The court below

found that the alleged conspiracy restrained only the "provision of surgical-medical hospital services in the Raleigh area," and such services are "a local, intrastate activity, not interstate commerce." (App. at 57-58.) The dissent expressly agreed with the finding of the majority that the alleged conspiracy did not operate "in commerce." (App. at 67, n.2.)

In determining whether the wholly intrastate conduct complained of substantially and adversely affected interstate commerce, the court below looked to what effect the alleged conspiracy to restrain hospital services would have on each of "the *specific line*[*s*] of commerce involved" in the provision of hospital services. (App. at 61, n.7; emphasis in original) The court concluded that the alleged conspiracy did not substantially affect commerce in any line of interstate commerce with which Mary Elizabeth had contact. (App. at 61.)

Further, after analyzing the alleged conspiracy, the court concluded, on the basis of the express and clear complaint allegations, that respondents "can do no more than delay, at most, whatever expansion seems economically wise to plaintiff [petitioner]." (App. at 64.) Contrary to petitioner's suggestion (Br. at 14), the majority below found the "object" or "subject" of the conspiracy was not "controlling" but merely "relevant" to the jurisdictional inquiry. (App. at 60.)

SUMMARY OF ARGUMENT

I. Subject matter jurisdiction under the Sherman Act is present only where the alleged conduct complained of has occurred in the flow of interstate commerce or if wholly intrastate, substantially and adversely affects interstate commerce. This jurisdictional inquiry under the Sherman Act differs significantly from that required when Congress itself has defined a class of activities which affect commerce. Where Congress itself has defined a class of activities as affecting commerce, the judicial

inquiry is not confined to specific conduct before the court but rather is focused on whether Congress had a rational basis for determining that the entire class of activities, considered in the aggregate, substantially affects commerce. In enacting the Sherman Act, Congress did not state in the Act that it applied in every situation where a company had some minimum contacts with interstate commerce. Rather, Congress left the courts to determine on a case-by-case basis whether the specific conduct alleged in the case before the court occurs in the flow of commerce or, if not, whether it substantially and adversely affects interstate commerce. The Act looks to the alleged unlawful conduct itself and requires a specific jurisdictional determination.

II. A. The conduct complained of in the instant case did not occur in the flow of interstate commerce. The complaint, as amended, alleges that respondents conspired to restrain the provision of hospital services in Raleigh, North Carolina, by preventing petitioner from expanding Mary Elizabeth Hospital in Raleigh, North Carolina, from a forty-nine bed facility to a one-hundred-and-forty bed facility. The means allegedly used to achieve the claimed purpose involved filing bad faith oppositions to petitioner's application for expansion with a state agency. It is not alleged that the claimed conspiracy sought to achieve its wholly intrastate objective by interfering with petitioner's use of out-of-state supplies or the financing and receipt of insurance payments. There was no alleged conspiracy to fix the prices or otherwise restrain trade in drugs or medicines purchased by petitioner in interstate commerce, or to control insurance payments coming across state lines to petitioner. The parties to the alleged conspiracy are all residents of the Raleigh area and not connected with out-of-state co-conspirators. The complaint alleges a wholly intrastate conspiracy to restrain a localized and personal service and is, therefore, outside the jurisdiction of the Sherman Act.

II. B. In the course of providing hospital services, petitioner utilized supplies and equipment that were shipped into North Carolina from out of state. Petitioner also treated patients who qualified for Medicare and Medicaid and who had health insurance with out-of-state insurance companies. These contacts with out-of-state activities did not transform the provision of hospital services in a local area into an interstate activity. The recent decision of *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), is not applicable to the instant case.

III. The alleged conspiracy related only to preventing petitioner from expanding the size of its facility by a total of ninety-one beds and did not substantially and adversely affect the flow of commerce in goods, supplies, and financing. The conspiracy had no adverse effects on any of the interstate markets in which petitioner's hospital purchased goods and services. Precedent of this Court in *United States* v. *Oregon State Medical Society*, 343 U.S. 326 (1952), *aff'g* 95 F. Supp. 103 (D. Oregon 1950) and *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), and substantial precedent in the lower courts have held that each interstate contact upon which petitioner relies for jurisdiction is insufficient.

The receipt of federal funds under Medicare and Medicaid, federal programs under the General Welfare Clause and not the Commerce Clause, cannot be used to transform an otherwise local activity into one subject to Sherman Act jurisdiction.

IV. The district court and the court below clearly dismissed petitioner's complaint for failure to satisfy the interstate commerce jurisdictional requirements of the Sherman Act and properly did so under Rules 12 (b) (1) and (b) (6) on the complaint allegations. Substantial precedent supported the district court's decision and, in a well reasoned opinion, the Appellate Court, *in banc*, affirmed. Moreover, during oral argument before the district court, petitioner requested the district court to rule on the motions to dismiss.

ARGUMENT

I. JURISDICTION UNDER THE SHERMAN ACT MAY BE INVOKED ONLY ON A CASE-BY-CASE BASIS, AND ONLY WHEN THE CONDUCT COMPLAINED OF OCCURS IN INTERSTATE COMMERCE OR, IF WHOLLY INTRASTATE, SUBSTANTIALLY AND ADVERSELY AFFECTS INTERSTATE COMMERCE.

Subject matter jurisdiction is present under Sections 1 and 2 of the Sherman Act only: (1) when the conduct complained of occurs *in* the flow of interstate commerce; or (2) when the conduct complained of "however local its immediate object, . . . substantially and adversely affects interstate commerce." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 195 (1974). *See also Burke* v. *Ford*, 389 U.S. 320, 321 (1967); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948).[6] Petitioner does not contest these standards for determining jurisdiction under the Sherman Act. (Br. at 21.)

Petitioner argues that the test of jurisdiction under the Sherman Act "is one of Congressional power" because " 'Congress wanted to go to the utmost extent of its Constitutional power . . .' " in enacting the Sherman Act and, therefore, the decision below is a determination that "Congress is without power under the commerce clause to reach the alleged conduct." (Br. at 20-21.) This argument is inaccurate and ignores the

[6] *See, e.g., Greenville Publishing Co., Inc.* v. *Daily Reflector, Inc.*, 496 F.2d 391, 395 (4th Cir. 1974); *United States* v. *Bensinger Co.*, 430 F.2d 584, 588 (8th Cir. 1970); *Marston* v. *Ann Arbor Property Managers (Management) Ass'n*, 302 F. Supp. 1276 (E.D. Mich. 1969), *aff'd per curiam*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970); *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d 269 (2d Cir. 1964); *Yellow Cab Co. of Nevada* v. *Cab Emp., Auto & W., Local #881*, 457 F.2d 1032 (9th Cir. 1972).

fundamental distinction between Congressional legislation under the Commerce Clause, and the specific judicial inquiry necessary for jurisdiction under the Sherman Act. Acceptance of petitioner's argument would require federal courts to exercise jurisdiction over every alleged restraint of trade, regardless of its effect upon interstate commerce.

Under the Commerce Clause, Congress may enact a regulatory scheme encompassing particular local practices which, individually, are not in commerce and have no substantial affect on interstate commerce.[7] As long as the "total incidence" of the class of activities subject to legislative regulation substantially affects interstate commerce,[8] Congressional power is properly exercised under the Commerce Clause. In these situations, unlike the Sherman Act, the necessary substantial effect on interstate commerce is established by "measuring" the incidence on commerce of the aggregate class of activities being regulated, not by measuring the effect on commerce of each practice alleged in a particular complaint.

For example, in *Perez* v. *United States*, 402 U.S. 146 (1971), petitioner challenged his conviction for "loan sharking" under Title II of the Consumer Protection Act (18 U.S.C. §§ 891 *et seq.*) as unconstitutional, arguing that his "loan sharking" conduct had no substantial affect on interstate commerce and was, therefore, not constitutionally subject to legislative proscription. Re-

[7] *See, e.g.*, Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000a-6 (1970); Title II of the Consumer Protection Act, 18 U.S.C. §§ 891 *et seq.* (1970); the National Labor Relations Act, 29 U.S.C. 151 *et seq.* (1970); and the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (1970).

[8] *Maryland* v. *Wirtz*, 392 U.S. 183, 190 (1968), quoting from *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964). *See also Perez* v. *United States*, 402 U.S. 146, 155 (1971).

ferring to *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), the Court emphasized that "it was the *class of activities* regulated that was the measure" (emphasis in original) and that "Congress [may] appropriately consider . . . the 'total incidence' of the practice on commerce." 402 U.S. at 154. The Court explained:

> Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class. *Maryland* v. *Wirtz*, 392 U.S. 183, 193 (1968). (*Perez* v. *United States*, 402 U.S. at 154; emphasis in original.)

Also, in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), petitioner argued that the 1961 amendment to the Fair Labor Standards Act was beyond Congress' power under the Commerce Clause because it expanded the Act's coverage to include "every employee who 'is employed in an enterprise engaged in commerce or in the production of goods for commerce'" (392 U.S. at 188; footnote omitted) and, therefore, included employees having no relationship to or effect on interstate commerce. The Court stated:

> *Darby* [*United States* v. *Darby*, 312 U.S. 100 (1941)] itself recognized the power of Congress instead to declare that an entire class of activities affects commerce. The only question for the courts is then whether the class is 'within the reach of the federal power.' The contention that in Commerce Clause cases the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest. *Wickard* v. *Filburn*, 317 U.S. 111, 127-128; *Polish Alliance* v. *Labor Board*, 322 U.S. 643, 648; *Katzenbach* v. *McClung*, *supra*, at 301. (392 U.S. at 192-93; footnotes omitted.)

The Court in *Maryland* v. *Wirtz*, *supra*, further stated that where Congress has itself determined that a class

of activities in total[9] has a substantial effect on interstate commerce, the Court will accept as conclusive that Congressional finding so long as Congress has "'. . . a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce. . . .'" (392 U.S. at 190; footnote omitted, quoting from *Katzenbach* v. *McClung*, *supra*.)

In cases where Congress has enacted legislation regulating a class of activities, including wholly intrastate activities having individually no substantial effect on interstate commerce, the judicial inquiry is not limited to the specific conduct complained of, but looks to the entire class of activities of which the individual practice reflects only a representative example.[10] No "case-by-case determination" is made as to whether the specific conduct which is the subject of the complaint before the court is in interstate commerce or even substantially affects interstate commerce. *See Katzenbach* v. *McClung*, 379 U.S. 294, 302-303 (1964).

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[9] *See also Wickard* v. *Filburn*, 317 U.S. 111, 127-28 (1942), where the Court stated:

> The effect of the statute before us [the Agricultural Adjustment Act of 1938, 55 Stat. 203 (1938)] is to restrict the amount [of wheat] which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

[10] *See Polish National Alliance* v. *National Labor Relations Board*, 322 U.S. 643, 648 (1944), where the Court indicated that the determination of whether jurisdiction is present under the National Labor Relations Act (29 U.S.C. §§ 151 *et seq.*) is not confined to the facts alleged in the complaint before it. Rather, the Court may consider whether the "immediate situation is representative of many others throughout the country, *the total incidence of which if left unchecked may well become* far reaching in its harm to commerce." (Emphasis added.)

The Sherman Act presents a far different test, for Congress did not define a class of activities as substantially affecting commerce. "The jurisdictional inquiry under general prohibitions like . . . the Sherman Act . . . differs significantly from that required when Congress itself has defined the specific persons and activities that affect commerce and therefore require federal regulation." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 197 n.12 (1974). Under the Sherman Act, the jurisdictional inquiry turns "* * * on the circumstances presented in each case * * *" and requires "* * * a particularized judicial determination * * *" (419 U.S. 197, n.12) of whether the conduct complained of occurs in interstate commerce or "* * * substantially and adversely affects interstate commerce * * *" (419 U.S. at 195).

Thus, in determining whether the jurisdictional requirements of the Sherman Act have been met, courts, including this Court, have measured whether the specific conduct complained of operates in or substantially and adversely affects interstate commerce, not whether such conduct is a part of a class of activities which, in toto, would be in commerce, or, in toto, substantially affect commerce. For example, in *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), the Court, in rejecting Sherman Act jurisdiction over local conduct of several multistate taxicab companies (marketers and operators), did not look to the possible class or group of taxicab activities of which Yellow Cab would be but a representative example, but rather looked only at the conduct before it and found that such conduct, in itself, did not substantially and adversely affect or burden interstate commerce. 332 U.S. at 231-233. Similarly, in *United States* v. *Oregon State Medical Society*, 343 U.S. 326 (1952), in affirming a denial of Sherman Act jurisdiction over statewide activities involving prepaid medical and hospital services (which included the provision of hospital care),

the Court examined only the activities before it and whether they amounted to a substantial impact on interstate commerce. 343 U.S. at 338-339. Under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (the "NLRA"), however, the test for jurisdiction would have been quite different and would have included a determination based on the entire class of activities within the industry. *See N.L.R.B.* v. *Fainblatt*, 306 U.S. 601, 604 (1939); *Maryland* v. *Wirtz*, 392 U.S. 183, 192-193 (1968). *See Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) (where the Court looked to "whether, in the circumstances pleaded" (*Id.* at 221), and whether "the material facts pleaded" (*Id.* at 222) demonstrated a substantial and adverse effect on interstate commerce).[11]

The jurisdictional inquiry in the instant case, therefore, is confined to the specific conduct complained of by petitioner, and whether that alleged conduct in and of itself, either is in the flow of interstate commerce or substantially and adversely affects it. Such a determination does not limit the legislative power of Congress under the Commerce Clause. Unlike the NLRA and other similar statutes (*see supra* at p. 13 n.7), Congress has made no attempt under the Sherman Act to declare legislatively that local intrastate restraints of trade are a substantial burden upon interstate commerce.

The *amicus curiae* Federation of American Hospitals, in its brief, disregards the specific inqury required under

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[11] *See also Rasmussen* v. *American Dairy Ass'n*, 472 F.2d 517, 527 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973) (where the court analyzed ". . . the extent to which prohibition of the defendants' specific conduct is justifiable as a means of protecting the specific line of interstate commerce involved," and stated "in this area, perhaps more than most, each case must turn on its own facts." (*Id.* at 526.)) *See Doctors, Inc.* v. *Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3d Cir. 1973).

the Sherman Act and the complaint allegations herein. It asserts that jurisdiction is present under the Sherman Act because: (1) the National Labor Relations Board has exercised jurisdiction under the NLRA (29 U.S.C. §§ 151 *et seq.*) over labor disputes in hospitals receiving a certain amount of gross revenues annually (Federation Brief at 21); and (2) Congress has enacted "other pieces of comprehensive legislation which affect hospitals throughout the United States." (*Id.*)

With respect to its argument relating to the NLRA, the Federation relies heavily upon *Butte Medical Properties*, 168 N.L.R.B. 266 (1967) (Federation Brief at 24-25). In *Butte Medical, supra*, the NLRB determined it had jurisdiction by analyzing the total effect on interstate commerce of all 970 proprietary hospitals [12] in the United States. Thus, the jurisdictional test utilized in *Butte Medical* has no application herein.

Moreover, the Federation's contention ignores the significant differences between the language of the NLRA and the Sherman Act. Under the NLRA (29 U.S.C. § 152(6)), "commerce" is defined as:

> . . . trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

[12] In *Butte Medical*, 168 N.L.R.B. 266, 268, the NLRB stated:

> While the purchases made by a particular proprietary hospital may not directly involve interstate commerce, the aggregate purchases of all such facilities clearly have a substantial impact on the operations of the various supplying industries and involve substantial shipments of goods and supplies in interstate commerce.

And "affecting commerce" (29 U.S.C. § 152(7)),

> . . . means in commerce, or burdening or obstructing commerce or the free flow of commerce, *or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.* (Emphasis added.)

In contrast, Congress did not define interstate commerce jurisdiction under the Sherman Act, but left the courts to determine when any alleged unlawful conduct either occurred in commerce or substantially and adversely affected commerce. (*See Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 197 n.12 (1974).)

Because of the significant differences between the language and purposes of the NLRA and the Sherman Act, courts have squarely rejected the arguments made by the Federation. For example, this Court and the Court of Appeals for the Seventh Circuit have ruled on the jurisdictional reach under the NLRA and the Sherman Act as to the taxicab industry. In *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), the Court held that the activities of a taxi company carrying interstate passengers from one interstate railroad terminal to another are in the flow of interstate commerce for purposes of the Sherman Act, but the activities of the same taxicab company in carrying interstate passengers from their homes or offices to the interstate terminal, and vice versa, are not sufficient to come within the Sherman Act.

In *Evanston Cab Co.* v. *City of Chicago*, 325 F.2d 907 (7th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964), the court, in reliance on *United States* v. *Yellow Cab Co.*, found that an alleged restraint of taxicab services to and from O'Hare Airport to homes and offices in Chicago was outside the jurisdiction of the Sherman Act. The court in *Evanston* specifically rejected plaintiff's argument that because the court had ruled taxicab services were within the jurisdictional ambit of the NLRA, a restraint of such services also satisfied the jurisdic-

tional tests of the Sherman Act. (325 F.2d at 911.) In rejecting plaintiff's argument in *Evanston*, the Seventh Circuit specifically referred to the broad definitions of "commerce" and "affecting commerce" in Section 2 of the NLRA, 29 U.S.C. §§ 152(6) and (7). (325 F.2d at 912). Under the NLRA, the entire cab company's business was relevant, but under the Sherman Act, only that part of the cab company's business affected by the alleged restraint was relevant.

The distinction between the jurisdictional requirements under the NLRA and the Sherman Act is further emphasized by the number of other cases holding, in essentially similar factual contexts, jurisdiction to be present under the NLRA but not under the Sherman Act. *Compare, N.L.R.B.* v. *Pierce Bros.*, 206 F.2d 569 (9th Cir. 1953) (where the court found NLRA jurisdiction existed over a local mortuary company because it recevied mortuary supplies and shipped some corpses out of state) *with John Kalin Funeral Home, Inc.* v. *Fultz*, 313 F.Supp. 435 (W.D. Wash. 1970), *aff'd per curiam*, 442 F.2d 1342 (9th Cir.), *cert. denied*, 404 U.S. 881 (1971) (where the court found it lacked jurisdiction over an alleged conspiracy in violation of the Sherman Act to restrain a local mortuary business that obtained supplies and shipped corpses out of state and had regular interstate communications); and *compare N.L.R.B.* v. *Inglewood Park Cemetery Association*, 355 F.2d 448 (9th Cir. 1966) (where the court found NLRA jurisdiction existed over a company engaged in the operation of a cemetery because the company sold burial lots and crypt spaces and purchased $3,086 of related items from out of state) *with Lawson* v. *Woodmere*, 217 F.2d 148 (4th Cir. 1954) (where the court found it lacked jurisdiction over an alleged conspiracy in violation of the Sherman Act to restrain the local sale of funeral vaults, even though plaintiff was engaged in purchasing and selling concrete and metal burial vaults and boxes which were purchased from out of state).

The foregoing comparisons make clear that decisions finding the presence of jurisdiction under the NLRA are not probative of jurisdiction under the Sherman Act. The Federation is requesting the Court to expand the jurisdiction of the Sherman Act beyond that defined by former precedent and to utilize precedent interpreting the jurisdictional standards of other federal legislation, having substantial differences in language and completely different purposes, to determine whether petitioner's complaint herein meets the jurisdictional requirements of the Sherman Act. The argument should be rejected, and the long established and clear Sherman Act standards should be applied in the instant case. As stated in *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 353 (1941), by Mr. Justice Frankfurter, wriing for the Court:

> Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business. The Interstate Commerce Act and the Federal Trade Commission Act are widely disparate in their historic settings, in the enterprises which they affect, in the range of control they exercise, and in the relation of these controls to the functioning of the federal system.

II. THE CONDUCT COMPLAINED OF OCCURRED ONLY INTRASTATE AND NOT IN THE FLOW OF INTERSTATE COMMERCE.

A. The Alleged Conspiracy Operated Wholly Within the Raleigh Area and Upon the Provision of a Localized and Personalized Service.

The complaint unequivocally sets forth the alleged product and geographic markets in which the claimed conspiracy and attempt to monopolize in violation of Sections 1 and 2 of the Sherman Act operated. It is alleged that respondents "engaged in an unlawful combination

and conspiracy in unreasonable restraint . . . in the furnishing of medical-surgical hospital services. . . ." (App. at 14.) Petitioner also alleges that respondent Rex directed and instigated the alleged conspiracy and such direction and instigation constitutes an attempt "to monopolize and to conspire . . . to attempt to monopolize the paid hospital business conducted . . . in the Raleigh area." (App. at 26.) The complaint categorically defines the relevant geographic market as the "Raleigh area" meaning "the area comprising Wake County, in the State of North Carolina." (App. at 12.)

The "hospital services" product market which is the sole subject of the alleged conspiracy consists of ". . . providing medical and surgical care to persons in need of short term medical treatment or surgery." (App. at 12.) The rendition of hospital services does not occur across state lines, but at Mary Elizabeth Hospital in Raleigh, North Carolina. According to the complaint, hospital services, the product allegedly restrained, is a localized and personalized service provided at a fixed location within Wake County.

The alleged conspiracy to restrain the provision of additional hospital services by Mary Elizabeth Hospital was purportedly effectuated by conspiratorially opposing petitioner's application to expand its facilities from forty-nine to one hundred and forty beds. (*See supra* at 3-7.) It is not alleged, nor could it be alleged, that the purported conspiracy sought to achieve its wholly intrastate object by regulating the alleged supplies, equipment, or financing for expansion of the new hospital, or by regulating Medicare, Medicaid or out-of-state health insurance payments.

Thus, the complaint alleges a conspiracy of local Raleigh residents to prevent another Raleigh resident from providing additional hospital services in the Raleigh

area. The means adopted to effectuate the purpose of the alleged conspiracy do not traverse state lines or involve goods or services travelling in the flow of interstate commerce. Accordingly, the alleged conspiracy operated wholly in Wake County, within North Carolina.

Precedent of this Court has held that a local intrastate conspiracy to restrain the provision of prepaid medical services does not operate in commerce. In *United States* v. *Oregon State Medical Society*, 343 U.S. 326 (1952), *aff'g*, 95 F. Supp. 103 (D. Oregon 1950), it was alleged that a state-wide society of doctors had conspired to restrain the provision of prepaid medical services in Oregon, including medical, surgical and hospital care. (343 U.S. at 330.) It was there claimed that the restraint prevented other organizations from offering "prepaid medical, surgical and hospital care and allied services. In the absence of the restraints hereinafter described, the State of Oregon would constitute a substantial market for the prepaid medical business of such organizations." 95 F. Supp. at 122. It was further found:

> [O]rganizations doing prepaid medical insurance business in the State of Oregon use interstate transportation and transmission facilities to transmit across state lines policies, reports, instructions, and correspondence. . . . Medical care policies and payments thereon by policyholders regularly flow in interstate commerce between the State of Oregon and other states. Prepaid medical poliices issued by Oregon organizations cover reimbursement for medical care required by Oregon residents while in other states. Said Oregon organizations arrange to pay for said medical care rendered by doctors, hospitals, and others in other states. * * * Organizations engaged in the sale and furnishing of prepaid medical care in Oregon . . . purchase and procure medicines, drugs, medical supplies and instruments

> shipped from other States into the State of Oregon. * * * Doctors practicing in Oregon treat patients who have come from other states to secure medical care in Oregon. (95 Supp. at 114-115).

In *Oregon Medical*, the Supreme Court affirmed the finding that the conduct complained of did not substantially affect interstate commerce for Sherman Act purposes. 343 U.S. at 338-339.

Substantial lower court precedent has also held that an alleged conspiracy to restrain the provision of hospital services provided in a geographic area wholly within a state does not operate in commerce.[13] Petitioner attempts to avoid the application of this precedent by arguing, in effect, that these decisions are outdated. (Br. at 42.) The analyses of the provision of hospital services made by the courts are surely not "outdated." Hospitals then and now buy some goods and drugs that originate from out of state and receive medical insurance payments from out of state. The provision of hospital services remains a personal, localized activity at a fixed location.

Contrary to the implications in petitioner's Brief (Br. at 42) that "the majority below" misconceived the nature of providing hospital services, the entire court below concluded that the alleged conspiracy to restrain the provision of hospital services by Mary Elizabeth

[13] *See, e.g., Spears Free Clinic and Hospital for Poor Children* v. *Cleere*, 197 F.2d 125 (10th Cir. 1952); *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F.2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Riggall* v. *Washington County Medical Society*, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958); *Robinson* v. *Lull*, 145 F. Supp. 134 (N.D. Ill. 1956), *United States* v. *Oregon State Medical Society*, 343 U.S. 326 (1952), *aff'g*, 95 F. Supp. 103 (D. Ore. 1950); *Nankin Hospital* v. *Michigan Hospital Service*, 361 F. Supp. 1199 (E.D. Mich. 1973).

did not occur in commerce and failed to satisfy that initial Sherman Act jurisdictional test.

Respondents are not herein arguing, and the court below did not conclude, that a conspiracy to restrain the provision of hospital services is, as a matter of law, incapable of occurring in interstate commerce. The determination turns upon the facts and complaint allegations in each case. For example, in *Doctors, Inc.* v. *Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3d Cir. 1973), plaintiff hospital alleged a conspiracy ". . . to control the area's hospital services" (*Id.* at 49) and ". . . to close down Doctors Hospital [Plaintiff therein] and to close down and limit operations of other area hospitals as well." (*Id.* at 51.) The alleged conspiracy in *Doctors, Inc., supra*, operated in a geographic and product market which included the provision of hospital services furnished by approximately one hundred (100) hospitals in an interstate geographic market consisting of eight counties located in Pennsylvania and New Jersey. (490 F.2d at 49, n.1, and 51.) The alleged conspiracy in *Doctors, Inc., supra*, was found to operate in interstate commerce. In contrast, the conspiracy alleged by petitioner does not operate in interstate commerce.

Courts have consistently followed the same analytical approach taken in the court below when deciding Sherman Act jurisdictional questions in other areas. The jurisdictional inquiry has been focused on the relevant product and geographic markets defined in the complaint allegations. The fact that a particular plaintiff, such as Mary Elizabeth Hospital herein, is engaged in other interstate activities, such as the purchase of materials and equipment from out of state, which are not the subject of the alleged conspiracy, does not place the alleged conspiracy in commerce. Jurisdiction under Sections 1 and 2 of the Sherman Act is not triggered by the persons

or companies involved in the suit but by the conduct complained of.[14]

For example, in *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), the goverenment's complaint alleged that defendants, who were interstate marketers and operators of taxis, controlling a majority of taxicab licenses in Chicago, Pittsburgh, and Minneapolis, had engaged in a conspiracy to restrain and monopolize the sale of automobiles for use as taxicabs in Chicago, Pittsburgh, New York, and Minneapolis and the furnishing of cab services in Chicago and vicinity. (*Id.* at 220 and 224.) With respect to the alleged Chicago area conspiracy, it was claimed that the taxicab companies had agreed not to compete for the transportation of passengers between interstate train terminals in Chicago and had conspired to control the principal cab companies in Chicago and to exclude others from the transportation of passengers to and from Chicago train terminals. (*Id.* at 228 and 230.) Looking to each of the alleged conspiracies and the alleged relevant product and geographic markets, the Court found there was Sherman Act jurisdiction over the conspiracy to restrain cab service between two interstate railroad terminals in Chicago, but no jurisdiction over the alleged conspiracy to restrain cab service provided to passengers going from their homes to the interstate railroad terminals. The fact that the companies were interstate companies was irrelevant.

Similarly, in *Page* v. *Work*, 290 F.2d 323 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961), plaintiffs alleged that

[14] Quoting language from *United States* v. *American Building Maintenance Industries*, 422 U.S. 271 (1975), defining the language "engaged in commerce" as used in Section 7, Clayton Act, referring to a "corporation engaged in commerce," petitioner argues that Mary Elizabeth purchases goods and services from out of state, and therefore arguably satisfied the jurisdictional standard of Section 7, Clayton Act. As discussed in the text, the jurisdictional standards under the Sherman Act are in issue herein, and those standards are invoked by the specific conduct alleged in the complaint, not by the overall business of the parties involved in the action.

defendants, 105 local newspapers and their trade association, conspired to restrain competition in legal advertising in Los Angeles County and to monopolize that market. Plaintiffs, suing on behalf of a defunct newspaper, alleged that its newspaper had operated in interstate commerce because it purchased ink, newsprint and other material from out of state and had out-of-state subscribers. It contended that the out-of-state supplies were an integral part of publishing the newspaper and transformed the local business of legal advertising into an interstate business. The court observed that the restraints alleged "were on a purely local level and were wholly directed to [a] local intrastate market." (*Id.* at 330.) It then held:

> The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business.
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> * * * *
>
> Appellant [seeks to] . . . lay down a simple rule that if a newspaper is engaged in interstate commerce it is entitled to the protection of the antitrust laws no matter where the particular restraint is applied. (*Id.* at 330.)[15]

In cases where the "in commerce" standard of Sherman Act jurisdiction has been satisfied, the alleged conspiracies have had as their subjects goods or services moving across state boundaries or the alleged conspira-

[15] *Accord, Yellow Cab Co. of Nevada* v. *Cab Emp., Auto. & W., Local #881*, 457 F.2d 1032, 1034 (9th Cir. 1972); *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341, 343 (9th Cir. 1969); *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d 269, 272 (2d Cir. 1964); *Cotillion Club, Inc.* v. *Detroit Real Estate Board*, 303 F. Supp. 850, 853 (E.D. Mich. 1964); *Marston* v. *Ann Arbor Property Managers (Management) Ass'n.*, 302 F. Supp. 1276, 1279 (E.D. Mich. 1969), *aff'd per curiam*, 442 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 827 (1970); *Hotel Phillips* v. *Journeymen Barbers*, 195 F. Supp. 664 (W.D. Mo. 1961), *aff'd per curiam*, 301 F.2d 443 (8th Cir. 1962).

cies, in their formation, have involved persons or companies in more than one state. For example, in *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945), defendants, in-state alcoholic beverage wholesalers and retailers, responsible for seventy-five percent of the alcoholic beverages sold in Colorado, virtually all of which were shipped into Colorado by out-of-state suppliers, conspired to fix the prices, markups and margins of profit on the sale of such beverages and enforced the price fixing conspiracy by forcing out-of-state beverage producers to enter into and to enforce fair trade contracts fixing prices at the conspiratorially set levels. (*Id.* at 295.) *See also Lehrman* v. *Gulf Oil Corp.*, 464 (F.2d 26, 32 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972) (where plaintiff was purportedly injured by an alleged conspiracy among Gulf Oil Corporation and its dealers throughout the Southwestern Region of the United States); and *A. Cherney Co.* v. *Chicago & Sub. Refuse Dis. Ass'n.*, 484 F.2d 751 (7th Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974) (where the plaintiff alleged defendants, refuse collectors, their trade association and out-of-state equipment manufacturers, conspired "to restrain and monopolize the private scavenger business within the geographic area including Chicago, its suburbs, parts of Indiana and Wisconsin . . . and St. Joseph, Missouri . . . ." (*Id.* at 752-53, n.1) and where the in-state defendants allegedly coerced the out-of-state equipment manufacturers to refuse to deal with plaintiffs).[16]

In the instant case petitioner does not contend that the alleged conspiracy involved local residents and out-of-state suppliers. The complaint alleges a conspiracy having as its object the restraint of the provision of hospital services in Wake County, North Carolina, allegedly effectuated by bad faith oppositions to Mary Elizabeth

[16] *See also Doctors, Inc.* v. *Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3d Cir. 1973); *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

Hospital's application for expansion before local state agencies. The conduct complained of by petitioner did not occur in commerce.

B. The Use of Out-of-State Supplies and Receipt of Insurance Payments Does Not Transform the Provision of Hospital Services in Wake County into Interstate Commerce.

Petitioner avoids focusing on the product and geographic markets in which the conspiracy allegedly operated. Instead, petitioner argues that in the course of providing hospital services in Wake County, North Carolina, Mary Elizabeth Hospital utilizes out-of-state supplies and equipment and treats patients who qualify for Medicare and Medicaid or who have health insurance with out-of-state health insurance companies. (Br. at 23-28 and 40-44.) These activities of Mary Elizabeth Hospital, it is concluded, transform the provision of hospital services in Wake County, North Carolina, into interstate commerce such that any restraint of any portion of Mary Elizabeth's hospital services must of necessity be in commerce. Petitioner invokes (Br. at 27) the talismanic phrase that "the provision of these hospital services is an integral part of interstate transactions," relying upon *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975).

Petitioner makes the identical argument that has been rejected by virtually every court that has considered it, and if accepted would bring every alleged restraint of trade, whether intrastate or interstate, within Sherman Act jurisdiction. In *Page* v. *Work*, 290 F.2d 323 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961), plaintiffs argued that the alleged conspiracy to monopolize the legal advertising market in Los Angeles County operated in the flow of interstate commerce because plaintiffs' defunct newspaper had utilized out-of-state newsprint and ink, and that such out-of-state supplies were an integral part of publishing the newspaper and transformed the

local business of legal advertising into an interstate business. The court rejected this argument, looking to the product and geographic markets in which the alleged conspiracy operated. (*Id.* at 330.) The alleged conspiracy did not involve the out-of-state purchases and only affected them indirectly.

Likewise, in *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969), plaintiff operated a garbage pickup and disposal and container leasing business in Clark County, Nevada. It alleged that defendant, a competitor of plaintiff, had conspired in violation of Sections 1 and 2 of the Sherman Act to monopolize the business. Plaintiff alleged that it purchased its containers from out-of-state and that the alleged conspiracy of defendant directed at the local activity of plaintiff operated in interstate commerce because it interfered with plaintiff's purchase of the out-of-state containers. (*Id.* at 343.) The court rejected plaintiff's contention, stating "Appellant supplied this [local] business with equipment from out of state. This fact alone does not turn what was really a local activity into an interstate one." (*Id.* at 343.)[17] *Compare, United States* v. *Bensinger*, 430 F.2d 584 (8th Cir. 1970) where the alleged illegal conduct involved a conspiracy between an in-state distributor and an out-of-state supplier to fix the price of one piece of equipment shipped across state lines.

Petitioner[18] relies heavily on *Goldfarb* v. *Virginia*

[17] *See also John Kalin Funeral Home, Inc.* v. *Fultz*, 313 F. Supp. 435 (W.D. Wash. 1970), *aff'd per curiam*, 442 F.2d 1342 (9th Cir.), *cert. denied*, 404 U.S. 881 (1971). *See also* the cases cited *supra* in footnote 15, at p. 27 herein.

[18] The *amicus curiae* Federation of American Hospitals makes essentially the same argument as does petiitoner and similarly attempts to measure Sherman Act jurisdiction by looking to the effect on interstate commerce of all hospitals. (Federation Brief at 8-16.)

State Bar, 421 U.S. 773 (1975), for its argument that the provision of hospital services is an "integral" part of the interstate purchase of supplies and receipt of payment from out-of-state insurers, including Medicare and Medicaid. However, petitioner's reliance is misplaced. In *Goldfarb*, plaintiff petitioners, on behalf of themselves and a class of all others similarly situated in Fairfax County, Virginia, brought an action against various Virginia bar associations. Petitioners in *Goldfarb* alleged that ". . . the operation of the minimum fee schedule, as applied to fees for legal services relating to residential real estate transactions, constitutes price-fixing . . ." in violation of the Sherman Act (421 U.S. at 778). The product market allegedly restrained was "legal services relating to residential real estate transactions," which "transactions" included the financing of home purchases.

The Court in *Goldfarb* noted that "a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the state of Virginia. . . ." (421 U.S. at 783.) Indeed, the lower court found that over 55 percent of the total volume of all mortgages in Fairfax County were to mortgagees located outside of Virginia (355 F. Supp. at 497) and also that "a large percentage of persons who live in Fairfax County work outside of Virginia (355 F. Supp. at 494), and a substantial percentage of the residents had moved into the county within recent years from out of state. (355 F. Supp. at 497.)

In *Goldfarb*, this Court explained the needed relationship between a local activity and an interstate transaction, which made the local activity "integral" to the interstate transaction:

> Thus in this class action the transactions which create the need for the particular legal services in question frequently are interstate transactions. The necessary connection between the interstate transactions and the restraint of trade provided by the minimum-

> fee schedule is present because, in a practical sense, title examinations are necessary in real estate transactions to assure a lien on a valid title on the borrower. *In financing realty purchases lenders require, 'as a condition of making the loan, that the title to the property involved be examined. . . .'* Thus, a title examination is an integral part of an interstate transaction. (421 U.S. 783-84, emphasis added; footnotes omitted.)

Accordingly, in *Goldfarb* the reason for the provision of legal services was the effectuation of the interstate housing financing transaction. The legal services in *Goldfarb* had no function or purpose separate and apart from the interstate housing financing transaction, ". . . which created the need for the particular legal services in question. . . ." (*Id.* at 783.) The legal services were consumed as an indistinguishable part of the interstate housing financing transaction.

Similarly, in *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 343 U.S. 219 (1948), the Court determined that an alleged conspiracy by sugar refiners in northern California to fix the purchase price of sugar beets sold by local sugar beet growers was in commerce. The Court concluded that the sugar beet sales were part of one integral refinery process from which sugar was obtained for sale in interstate commerce. In *Mandeville*, the reason for sale of sugar beets was the effectuation of the interstate sale and distribution of sugar. As with the legal services in *Goldfarb*, the cultivation and sale of sugar beets in *Mandeville* had no function or purpose separate and apart from the interstate sale and distribution of sugar, "which created the need for the particular" local sugar beet commodity. The sugar beets were consumed as an indistinguishable part of the interstate sale and distribution of sugar.

In contrast, the provision of hospital services by Mary Elizabeth Hospital has a purpose and function separate

and apart from the receipt of Medicare or Medicaid and private health insurance payments and the use of out-of-state equipment and supplies. The reason for the provision of hospital services is the personal and localized need of the patient, not the effectuation of interstate health insurance or supply sales. In the instant case, the provision of hospital services are not consumed as an indistinguishable part of interstate supply sales or the provision of health insurance, as were the legal services in *Goldfarb* and the sugar beets in *Mandeville*. Mary Elizabeth Hospital may consume out-of-state supplies in the course of providing a local service, but virtually all local businesses, such as the provision of local taxi service,[19] utilize supplies that have travelled among the states. The fact that a local business makes use of goods or services that have travelled across state lines does not make every local business "integral" to the interstate commerce of such goods and services. Virtually all interstate commerce terminates in a local sale or the provision of a local service, but the local sale or service is "integral" to the interstate commerce of such goods and services only when the local service has no purpose or function separate and apart from the interstate sale or service. Accordingly, the provision of hospital services by petitioner is not transformed into or made an integral part of interstate transactions because it may use out-of-state supplies, equipment and insurance in rendering such services.

Petitioner also mistakenly relies on *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), claiming that Mary Elizabeth Hospital's contacts with interstate communications place it in interstate commerce

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[19] *See United States* v. *Yellow Cab Co.*, 332 U.S. 218, 233, where the Court held that daily taxi service of persons from their homes to railroad stations for interstate travel, was "not an integral part of interstate transportation," and did not transform that activity into an interstate activity.

just as the interstate contacts of the defendants-respondents in *South-Eastern Underwriters, supra.* (Br. at 43.) The facts in *South-Eastern Underwriters, supra*, are not at all similar to the facts in the instant case. In *South-Eastern Underwriters, supra*, the complaint alleged an underwriting association and its approximately 200 member companies, controlling ninety percent of the fire insurance sales in the relevant multi-state geographic market, conspired to fix premium rates and commissions across a six-state area and to use boycotts and other types of coercion and intimidation to force non-member companies to join the conspiracy and to compel persons to buy insurance only from the association and its members (322 U.S. at 534-35).[20] In deciding that the conspiracy alleged in *South-Eastern Underwriters, supra*, occurred in the flow of interstate insurance business, the Court noted that of the 200 allegedly conspiring companies only eighteen maintained home offices in the six-state geographical market, and that the business of negotiating insurance policies and policy premiums occurred between company headquarters and customers across state lines. In short, the Court found the daily activity in several states and the alleged conspiracy to restrain the insurance business across six states occurred in the flow of interstate commerce.

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[20] Petitioner suggests that because the Court in *South-Eastern Underwriters, supra*, considered relevant the fact that the out-of-state headquarters of the defendant insurance companies made decisions that were implemented in several states where those companies sold insurance, the Court in the instant case should consider other "local markets such as the Raleigh area" (Br. at 43) in determining the jurisdictional questions herein. This suggestion disregards the significant and critical fact that the complaint allegations in *South-Eastern Underwriters, supra*, related to a multi-state geographic market controlled by companies outside those states. Wake County, North Carolina, is the sole geographic market alleged in the petitioner's complaint allegations.

III. THE CONDUCT COMPLAINED OF DID NOT SUBSTANTIALLY AND ADVERSELY AFFECT INTERSTATE COMMERCE.

A. The Effect, If Any, of the Alleged Conspiracy on Interstate Commerce Resulted Indirectly from the Alleged Prevented Expansion of Mary Elizabeth Hospital.

The second test for Sherman Act jurisdiction is whether the conduct complained of, "however local its immediate object . . . substantially and adversely affects interstate commerce." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 195 (1974). The conduct complained of in petitioner's amended complaint does not "substantially and adversely" affect interstate commerce and therefore fails to satisfy the second jurisdictional standard under the Sherman Act.

Petitioner has alleged in its complaint, as amended, that in 1972: it purchased goods and equipment "pursuant to national contracts negotiated" by petitioner's parent "which . . . establish the terms of purchase" (App. at 35); it "regularly utilizes interstate communications, including the mails, telephone and telegraph, to carry on its business" (App. at 35); it pays its out-of-state parent a fee for management services (App. at 35); "a substantial number of persons regularly come from states other than North Carolina to the Raleigh area for treatment in medical-surgical hospitals there" (App. at 36); it receives payment for hospital services provided to patients from private insurance companies, including Blue Cross and Medicare and Medicaid (App. at 36); it will finance the cost of its expansion with out-of state-loans (App. at 37); it is the wholly-owned subsidiary of an out-of-state corporation (App. at 34), and it is accredited by a national hospital accreditation organization (App. at 37).

The complaint allegations make clear that the conduct complained of was a conspiracy to prevent petitioner from obtaining approval of its application to expand Mary Elizabeth Hospital in Raleigh, North Carolina, from a 49-bed facility to a 140-bed facility. (*See supra* at pp. 3-7). Petitioner concedes that its application for expansion was approved on June 30, 1972, only eight months after it was filed (App. at 18 and 21). It is also conceded that, if no opposition had been filed by respondents, petitioner would not have been able to obtain approval and begin construction until March 1, 1972. (App. at 26.) The alleged conspiracy, therefore, caused a delay of approximately four months in obtaining approval for expansion.

Petitioner also alleges that an appeal of its approval was taken pursuant to the alleged conspiracy to oppose its planned expansion. (App. at 23.) Such appeal did not stay the approval of petitioner's Certificate of Need, and petitioner could have, therefore, commenced construction on its planned expansion. Petitioner does not deny that no stay of the approval of its Certificate of Need was obtained. (Br. at 9, n.11.)

In response to questions from the district court below during oral argument, counsel for petitioner made clear that the gravamen of petitioner's complaint was the "thwarting" of petitioner's planned expansion of Mary Elizabeth Hospital:

> THE COURT: But what you complain of here is not the actual commerce with some out of state supplier or lender or patient or something but your ability to expand an existing business, triple it I believe you say, in order to provide more services, and it is that thwarting of your intention and your desire to expand your business that has been the subject of their alleged restraint, is it not?
>
> MR. TRAIN: That's correct. (App. at 43-44.)

In its Brief (App. at 26, 28 and 30-31), petitioner paraphrases conclusory assertions in its complaint that respondents conspired ". . . to fix, maintain and allocate the number of paid hospital beds . . . in the Raleigh area. . . ." (App. at 15.) All the allegations of fact in support of these conclusions involve the alleged conspiracy to prevent the expansion of Mary Elizabeth Hospital.

Even assuming the alleged conspiracy began in 1970, petitioner alleges nothing to indicate that respondents undertook any action other than the opposition to petitioner's application for a Certificate of Need and the appeal of the approval of that application in pursuance of the conspiracy.[21] Accordingly, even though the alleged conspiracy only resulted in a delay of four months in gaining approval of petitioner's Certificate of Need, respondents herein have addressed the complaint as if it alleged that respondents had prevented Mary Elizabeth Hospital's expansion from March 1, 1972, the date upon which petitioner admits it was prepared to commence construction, until the Certificate of Need Act was invalidated in February, 1973.[22]

It must be emphasized that the complaint does not allege and petitioner does not contend that the alleged conspiracy had as its object the elimination of Mary Elizabeth Hospital from Wake County, North Carolina. More significantly, it is not contended that, other than the delay in obtaining approval of its Certificate of Need, the alleged conspiracy interfered with the amount of goods purchased by petitioner, or interfered with or

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[21] Petitioner also alleges that respondents created adverse publicity against petitioner's expansion by publicly stating respondent Rex and co-conspirator Wake could supply the additional hospital beds allegedly needed in the "Raleigh area." (App. at 24.) Petitioner does not state the manner in which such statements prevented it from commencing construction of its expansion.

[22] *See In the Matter of Certificate of Need for Aston Park Hospital*, 282 N.C. 542, 193 S.E.2d 729 (S.Ct. N.C., February 1973).

limited the number of Mary Elizabeth Hospital's patients whose hospital care was paid for by Medicare, Medicaid or private health insurance, or limited the number of out-of-state patients that Mary Elizabeth treated.

B. The Alleged Prevention of the Expansion of Mary Elizabeth Hospital Did Not Substantially and Adversely Affect Interstate Commerce.

The Court in *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 202 (1974), explained the analysis to be undertaken in determining whether the conduct complained of, although local and intrastate, substantially and adversely affects interstate commerce:

> A court cannot presume that such [substantial] effects exist. The plaintiff must allege and prove that *apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods in order to invoke federal antitrust prohibitions. See U.S.* v. *Yellow Cab Co.*, 332 U.S. at 230-234.[23] (Emphasis added.)

Similarly, in *Rasmussen* v. *American Dairy Ass'n.*, 472 F.2d 517, 527 (9th Cir.), *cert. denied*, 412 U.S. 950 (1973), the court in determining whether a statewide conspiracy substantially and adversely affected the interstate commerce of a product, stated:

> The basic issue . . . is the extent to which a prohibition of the defendants' specific conduct is justifiable as a means of protecting the specific line of interstate commerce involved.

[23] *See also United States* v. *American Building Maintenance Industries*, 422 U.S. 271, 278 (1975) ("the Sherman Act has been applied to local activities which, although not themselves within the flow of interstate commerce, substantially affect interstate commerce"). This is not a *de minimus* test, as argued by petitioner (Br. at 32) but one of substantial effect. Indeed, the reach of Congressional power under the Commerce Clause is one of "substantial impact" on interstate commerce. *See United States* v. *Darby*, 312 U.S. 100, 119 (1941).

In addition to analyzing whether the complained of conduct adversely affected "interstate markets," the Court has also looked to the total dollar amount of goods or materials travelling interstate which were adversely affected by the alleged local conspiracy. For example, in *Burke* v. *Ford*, 389 U.S. 320-21 (1967), the Court found the interstate flow of liquor into Oklahoma was substantially and adversely affected by an alleged intrastate conspiracy of all the liquor wholesalers in Oklahoma to allocate territories for the sale of liquor, all of which liquor sold in the state was shipped into Oklahoma from outside the state. The court in *Burke* v. *Ford*, *supra*, noted that wholesale purchases of such out-of-state liquor amounted to between $44 million and $45 million in 1964. (389 U.S. at 321, n.1.)

Similarly, in *United States* v. *Employing Plasterers Ass'n*, 347 U.S. 186 (1962), the Court found jurisdiction present where a labor union and a trade association of contractors, which contractors did 60% of the plastering contract business in Chicago, conspired "to prevent out-of-state contractors from doing any business in the Chicago area and to bar entry of new local contractors" without union approval. (347 U.S. at 188.) In finding jurisdiction was present, the Court stated: "a local group of people were to a large extent able to dictate who could and who could not buy plastering materials that had to reach Illinois through interstate" commerce. (347 U.S. at 189.)

In other situations where the activities involved in the alleged conspiracy or attempt to monopolize are local and intrastate, courts have considered the subject, or thrust or aim of the alleged conduct in determining whether the effect of such conduct in interstate commerce is substantial.[24] In *United States* v. *Yellow Cab*

[24] Relying on *Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26 (6th Cir.), *cert. denied*, 409 U.S. 1077 (1972), petitioner argues that the court below erred in considering the thrust or subject of the conduct

Co., 332 U.S. 218 (1947), the Court looked to the object or thrust of the alleged conspiracy (the commerce "toward which this aspect of the conspiracy was *directed*" (*Id.* at 230; emphasis added)) and determined that Sherman Act jurisdiction was not present. *See also Lorain Journal* v. *United States*, 342 U.S. 143, 150 (1951) ("the publisher's conduct was aimed at a larger target").[25]

The alleged conspiracy in the instant case had as its subject the provision of hospital services in Wake County and could not have substantially and adversely affected the interstate commerce in each product line which Mary Elizabeth Hospital received from out of state. More importantly, the alleged conspiracy was incapable of interfering with competition in those interstate transactions in supplies, insurance, communication and interstate travel. An analysis of each such interstate contact will demonstrate that the alleged conspiracy did not and could not substantially and adversely affect interstate commerce.

1. *The Use of Out-of-State Supplies and Equipment*

Petitioner argues that the alleged conspiracy to prevent Mary Elizabeth Hospital's expansion "impedes the

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complained of as relevant to the determination of whether interstate commerce has been affected substantially and adversely. (Br. at 34.) In *Lehrman*, the thrust of the alleged conspiracy was irrelevant because, as the court there found and as the plaintiff there alleged, the claimed price fixing conspiracy was multi-state, covering the entire Southwest. (*Id.* at 32.)

[25] *Accord, United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 297 (1945) ("this Court has on occasion determined that local conduct could be insulated from the operation of the antitrust laws on the basis of the purely local aims of a combination . . ."); *Page* v. *Work*, 290 F.2d 323, 330 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961); *Yellow Cab Co. of Nevada* v. *Cab Emp. Auto. & W. Loc. #881*, 457 F.2d 1032, 1035 (9th Cir. 1972); *Marston* v. *Ann Arbor Property Managers (Management) Ass'n*, 302 F. Supp. 1276, 1280 (E.D. Mich. 1969), *aff'd per curiam*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970).

natural flow of supplies and services" and "particularly the substantially increased flow of supplies and services" that would have been transmitted "to an expanded" Mary Elizabeth Hospital. (Br. at 30.) The complaint does not allege that the conspiracy interfered with the purchase of equipment and supplies,[26] nor is it claimed that the purpose of the alleged conspiracy was to be achieved by restricting the out-of-state supplies utilized by petitioner, or by fixing prices on such out-of-state supplies or services. Rather, it is alleged that the conspiracy prevented the approval of Mary Elizabeth Hospital's application for a ninety-one bed expansion. Accordingly, any effect on the flow of supplies in interstate commerce could have resulted only to the extent that each of the planned additional 91 beds would have been occupied, and occupied by patients requiring the types of supplies and materials that traveled in interstate commerce. (Br. at 26.)

Moreover, the duration of the effect, if any, on the flow of supplies to Mary Elizabeth Hospital, according to the complaint allegations, was for approximately four months and only for the supplies needed for the additional ninety-one beds. Further, the complaint, as amended, does not allege that Mary Elizabeth purchased these supplies from out of state. The complaint allegations assert only that the supplies "are purchased pursuant to national contracts negotiated by" petitioner's parent company.

More importantly, petitioner has not alleged that the claimed conspiracy will have any effect on the interstate market for such supplies and equipment in Raleigh, North Carolina, or elsewhere. Out-of-state suppliers are not allegedly involved in the claimed conspiracy, and are continuing to compete for sales in the Raleigh area.

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[26] *See Elizabeth Hospital, Inc.* v. *Richardson*, 269 F.2d 167, 170 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959).

The delay in the expansion of Mary Elizabeth Hospital will not lessen this competition because Mary Elizabeth Hospital purchases its supplies "pursuant to national contracts" "which [contracts] establish the terms of purchase" and are negotiated by petitioner's parent. (App. at 35.) Thus, as stated in *Rasmussen* v. *American Dairy Ass'n.*, 472 F.2d at 527, the "prohibition" of respondent's "specific conduct is [not] justifiable as a means of protecting the specific line of interstate commerce involved." *See also Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. at 202.

Overwhelming precedent squarely holds that an alleged conspiracy to restrain the operation of a local business, such as the instant alleged conspiracy to restrain the provision of hospital services, does not substantially and adversely affect interstate commerce in the out-of-state supplies purchased by that business.

In *United States* v. *Oregon State Medical Society*, 343 U.S. 326 (1952), *aff'g*, 95 F.Supp. 103 (D. Oregon 1950), the government alleged that a statewide organization of doctors had conspired to restrain and to monopolize the provision of prepaid medical care throughout the State of Oregon. (343 U.S. at 330.) The prepaid medical care plan included the provision of hospital care and the organizations regularly "purchas[ed] and procur[ed] medicines, drugs, medical supplies, and instruments shipped from other states . . . into the State of Oregon." (95 F.Supp. at 114.) The organization also engaged in the use of interstate transportation and communication facilities to carry on its business. The court affirmed the finding of the district court that such interstate contacts were insufficient for Sherman Act jurisdiction.

Similarly, in *Page* v. *Work*, 290 F.2d 323 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961), plaintiffs claimed the alleged conspiracy to monopolize the legal advertising market in Los Angeles County had a "direct and substantial effect" on the interstate commerce in newsprint and ink because plaintiffs' newspaper ceased buying newsprint and ink when it went out of business. The court rejected plaintiffs' argument stating that the defendants ". . . were in no position to nor did they restrict competition in the newsprint market" (*Id.* at 332) and there "was no evidence that appellees [defendants] did anything to interfere with newsprint purchases . . ." by plaintiff. (*Id.*) *Accord, Evans* v. *S. S. Kresge Co.*, 394 F.Supp. 817, 838 (W.D. Pa. 1975); *Marston* v. *Ann Arbor Property Managers (Management) Ass'n*, 302 F.Supp. 1276 (E.D. Mich. 1969), *aff'd per curiam*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970).[27]

2. *The Receipt of Insurance Payments from Out-of-State Insurers and Medicare and Medicaid*

Petitioner also contends that the alleged conspiracy will substantially and adversely affect "the flow of payments for hospital services from out-of-state health insurers and the federal government under Medicare and Medicaid." (Br. at 30.)[28] The complaint does not claim that the alleged conspiracy herein involved any out-of-state insurer. Nor does the complaint allege that the conspiracy to prevent petitioner's expansion was accomplished by interference with out-of-state insurance, Medicare and Medicaid payments. Thus, the fact that

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[27] *See also Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969); *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d 269 (2d Cir. 1964).

[28] Relying on *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), petitioner and the *amicus curiae* Federation of American Hospitals argue that because some of the patients petitioner treat qualify for Medicare or Medicaid and have private health insurance, the provision of hospital services to those patients is "integral" to an interstate transaction, *i.e.*, the payment by those insurance companies. Respondents have addressed those arguments in another part of this Brief. *See supra* at pp. 29-34.

petitioner receives such payments is not relevant to the jurisdictional inquiry. The only claim is that the alleged out-of-state payments and communications would have increased if the alleged conspiracy had not delayed the approval of the Certificate of Need. (Br. at 26.)

In *United States* v. *Oregon State Medical Society*, *supra*, the Court held that the interstate contacts of a statewide prepaid health plan were insufficient to satisfy the jurisdictional standards of the Sherman Act. In that case, the statewide organization sent medical policies across state lines, and, as part of its "regular course of business, arrang[ed] to pay for . . . medical care rendered by doctors, hospitals and others in other states . . . ." (95 F. Supp. at 122.) These contacts were held insufficient for Sherman Act jurisdiction. 343 U.S. 326 (1952).

Medicare and Medicaid are wholly administered by in-state intermediaries and carriers. (*See* 42 U.S.C. §§ 1395h and 1395u.) In North Carolina, the state intermediary for Medicare is Blue Cross of North Carolina[29] and Mary Elizabeth Hospital deals with Blue Cross of North Carolina for reimbursement under Medicare for treatment provided to qualifying patients. North Carolina Blue Cross processes requests for payments and actually makes the payments for hospital services from funds which have been made available to it. (20 C.F.R. § 405. 1803(a) (1975) and 42 U.S.C. § 1395h(a)). Thus, the administration of and payments made under Medicare for hospital services rendered by Mary Elizabeth Hospital are all intrastate even though federal funding is involved. However, the funds are allocated on a regular

[29] Petitioner alleges that 56 per cent of its charges were made to private insurance programs, including Blue Cross. Petitioner does not advise the Court that virtually each state and major metropolitan area has an independently financed, regulated, operated and incorporated Blue Cross plan. Blue Cross is a state-wide insurance plan, regulated by the State of North Carolina. *See* G.S. North Carolina, §§ 57.1 *et seq.* (Michie Replacement 1957).

basis to the local intermediary by letter of credit, and the amount of such funds are based on an estimate, not for past services rendered. (31 C.F.R. §§ 205.1 *et seq.* (1975)).

The only distinction between the interstate contacts in the instant case and those in *Oregon State Medical*, *supra*, other than the fact that the interstate contacts herein are far less substantial than in *Oregon State Medical*, is the indirect contacts with federal funding. As amendments to the Social Security Act, the Medicare and Medicaid programs are established and funded under the General Welfare Clause of the Constitution. *See Helvering* v. *Davis*, 301 U.S. 619 (1937). Accordingly, petitioners are arguing that the scope of Sherman Act jurisdiction, a statute passed under the authority granted in the Commerce Clause of the Constitution, may be enlarged by virtue of funds received under legislation enacted under the General Welfare Clause. Yet, Congress explicitly provides in 42 U.S.C. § 1395 that such funding shall not be the basis for any federal regulation of hospital and medical services. Legislation passed under the General Welfare Clause, such as Social Security, reaches into every walk of life.[30] If jurisdiction under the Sherman Act may now be grounded on the movement of funds appropriated through legislation enacted under the General Welfare Clause, every employer who is involved in the Social Security program will be subject to Sherman Act jurisdiction. Thus, legislative authority limited by one Constitutional clause will be expanded by virtue of another. Certainly, this cyclical enlargement of federal power should not be permitted. *See N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937), and *Maryland* v. *Wirtz*, 392 U.S. 183, 197 (1968).

[30] *See, e.g.*, Food Stamp Act of 1964, 7 U.S.C. §§ 2011 *et seq.* (1970); Social Security Act of 1935, 49 Stat. 620 (1935) codified throughout Title 42 U.S.C. (1970).

The conspiracy alleged in petitioner's complaint could have had no effect on competition in the private health insurance market in Raleigh, North Carolina, and nationwide. It is not alleged that out-of-state insurers were involved in the conspiracy.[31] Moreover, there is no competitive market for Medicare and Medicaid payments. Any patient who qualifies for those programs is entitled to payment, and patients may select any hospital in Raleigh, North Carolina, to provide them with service. (App. at 13.) Competition is for the treatment of patients, and this competition occurred in Raleigh, North Carolina.

3. *Communications Across State Lines*

Petitioner's argument concerning its receipt of payment from out-of-state insurance companies and Medicare and Medicaid[32] is very similar to its argument concerning its use of interstate communications including telephone, telegraph and the mails. (App. at 35.) Both arguments implicitly are based upon the supposition that interstate communications, whether payments or correspondence, would have increased absent the alleged conspiracy to delay Mary Elizabeth Hospital's expansion. In both arguments, petitioner relies upon the interstate communications engaged in by virtually every business.

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[31] Petitioner misrelies on the complaint filed in *United States* v. *American Society of Anesthesiologists, Inc.*, Civil No. 75-4640 (S.D.N.Y. filed September 22, 1975), for the proposition that payments by insurance companies and Medicare and Medicaid constitute an independent jurisdictional basis under the Sherman Act. (Br. at 25, n.28.) The American Society of Anesthesiologists, Inc.'s, complaint alleges a nationwide price fixing conspiracy among the Society, all its members and component societies. (Br. at A-2.)

[32] Because Medicare is totally administered by a local Blue Cross corporation (*see supra* at p. 44), petitioner may have virtually no out-of-state communications with respect to the provision of hospital services to patients in this program.

In *Cotillion Club Inc.* v. *Detroit Real Estate Board*, 303 F.Supp. 850 (E.D. Mich. 1964), plaintiff made virtually the same assertions as petitioner does herein, alleging that defendants, real estate brokerage firms, conspired to restrain trade in the ". . . purchase, sale, transfer, [and] financing of real estate, including federally financed and insured real estate. . . ." (*Id.* at 852.)

The complaint in *Cotillion Club* alleged the receipt and transmission of "information and listings to and from other states," the filing of "applications, reports and other documents for transmittal to Washington, D.C., or other out-of-state offices of various Federal Housing Agencies," and the completion of "investigations, appraisals and surveys of federally financed or insured Michigan real estate to be transmitted to other states." (*Id.* at 853.) The court in *Cotillion Club* stated:

> [A]n attempt has been made to rely upon certain incidental activities across state lines [to invoke Sherman Act jurisdiction]. This is an effort to utilize incidental minor activities, consisting of the transmission of information across state lines, as a jurisdictional foundation for a substantive charge of alleged federal antitrust violations. The effort is strained and, in the Court's opinion, overreaching. The foundation is patently incapable of supporting such a structure. (*Id.* at 854.)

Accord, John Kalin Funeral Home, Inc. v. *Fultz*, 313 F.Supp. 435 (W.D. Wash. 1970), *aff'd per curiam*, 442 F.2d 1342 (9th Cir.), *cert denied*, 404 U.S. 881 (1971).

The Court's observation in *Cotillion Club* is applicable in the instant case. Any business, regardless of size, engages in the use of interstate means of communication. The connection between the alleged conspiracy and the volume of correspondence and use of interstate com-

munications is a strained attempt by petitioner to list every conceivable contact it may have with out-of-state facilities, regardless of significance or relationship to the alleged conspiracy.

4. *Out-of-State Financing and the Planned Expansion of Mary Elizabeth Hospital*

Petitioner also claims the alleged conspiracy has a substantial and adverse effect on interstate commerce because petitioner intended to use out-of-state financing for the expansion of Mary Elizabeth Hospital. (App. at 37; Br. at 30.) It is not alleged that the purported conspiracy to prevent the expansion was effectuated by interfering with petitioner's financing.[33] The alleged financing of the expansion was a "one-shot" arrangement. In *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d (2d Cir. 1964), plaintiff, a wholly-owned subsidiary of an out-of-state corporation, alleged defendants had conspired in violation of Section 1 of the Sherman Act to terminate plans for the construction of a bowling alley, which would have been constructed with out-of-state materials. The court there held that the alleged conspiracy did not have a substantial and adverse effect on the interstate equipment which would have been utilized in the construction because the alleged financing was a "one-shot" occurrence.

5. *Travel of Out-of-State Patients and Other Alleged Out-of-State Contacts*

In its Brief (Br. at 26), petitioner also argues that Mary Elizabeth Hospital competes with respondent Rex

[33] In its Brief, petitioner states its financing "commitment expired of tis own terms." (Br. at 9.) This "fact" was not alleged in the amended complaint and was not presented to either the district court or the court of appeals and is not part of the record. Moreover, petitioner's statement does not indicate whether its financing expired before or after it obtained approval to expand on June 30, 1972

and alleged co-conspirator Wake to serve out-of-state patients "who come to the Raleigh area for treatment." Recognizing that courts have with virtual uniformity found that such allegation is insufficient for a finding that an alleged local conspiracy to restrain the provision of hospital services substantially and adversely affects interstate commerce, petitioner states it is not relying on this allegation for jurisdiction. (Br. at 26, n.32.)

Substantial precedent holds that an alleged conspiracy to restrain the provision of hospital services in a local area, such as Wake County, North Carolina, where some of the patients treated come from out of state, does not have a substantial and adverse effect on the interstate travel. *See Elizabeth Hospital, Inc.* v. *Richardson*, 269 F.2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *United States* v. *Oregon State Medical Society*, *supra; Nankin Hospital* v. *Michigan Hospital Service*, 361 F. Supp. 1189 (E.D. Mich. 1973); and *United States* v. *Yellow Cab Co., supra.* As stated in *Hotel Phillips, Inc.* v. *Journeymen Barbers*, 195 F. Supp. 664, 669 (W.D. Mo. 1961), *aff'd*, 301 F.2d 443 (8th Cir. 1962):

> Neither the facts in this case, nor any other authority known, supports the theory here advanced, namely, that local activities are illegal under the Sherman Act because they concern persons who have previously moved in interstate commerce or who, after receiving a local personal service, may thereafter move in interstate commerce.

Petitioner's remaining complaint allegations are that it is a local subsidiary of an out-of-state corporation[34] which provides petitioner with management services for

[34] Petitioner alleges in its complaint that it is the wholly-owned subsidiary of a parent corporation that owns several hospitals in other states. (App. at 36.) The alleged conspiracy by two non-profit local hospitals in Raleigh, North Carolina, could have no practical effect on the ability of petitioner to compete in the provision of hospital services.

a fee, and petitioner has been accredited by a national accreditation agency. (App. at 34 and 37.) The conspiracy alleged in the complaint has had no substantial and adverse effect on these fixed relationships, or upon any of those interstate markets. *See Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. at 202. *See also United States* v. *Yellow Cab Co.*, *supra;* and *United States* v. *Oregon State Medical Society, supra.*

6. *The Necessity for a Jurisdictional Line Under the Sherman Act*

As recognized by Judge Craven in the majority opinion below, there are no bright lines dividing cases in which the effect of the alleged anticompetitive conduct substantially and adversely affects interstate commerce from those cases in which it does not. "The complexities of modern business have little room for contracts, or business transactions, which cannot be said in some degree to affect interstate commerce." *Cotillion Club*, 303 F. Supp. at 854. Virtually every business utilizes supplies that flow in interstate commerce and engages in interstate communication with the federal government and with suppliers. The question in each Sherman Act case is where should the jurisdictional line be drawn. This line must be drawn, under the Sherman Act, on a case-by-case basis analyzing the facts alleged. Respondents submit that the instant case presents a situation that should fall outside the scope of the Sherman Act and into the sphere of state antitrust laws. The states all have mini-Sherman Acts and alleged restraints of trade can be successfully challenged under such statutes. (*See e.g.*, G.S. North Carolina, §§ 75-1 *et seq.* (Michie Replacement 1975)). However, if the all-persuasive influence of federal spending under the General Welfare Clause is to be the tail which wags the dog of the interstate commerce test, the federal system will experience another step toward its demise. As recognized by this

Court in *N.L.R.B.* v. *Jones & Laughlin, supra,* 301 U.S. at 37, in upholding the broad sweep of the National Labor Relations Act, in an opinion by Chief Justice Hughes:[35]

> Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. Id. The question is necessarily one of degree.

IV. THE *EN BANC* DECISION CORRECTLY AFFIRMED DISMISSAL OF THE ACTION ON THE AMENDED COMPLAINT ALLEGATIONS.

Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure specifically contemplate dismissals on the complaint allegations where such allegations, if proved, will not support jurisdiction. The case authority is legion on the correctness of this dismissal on the complaint allegations for failure to state a claim or for lack of jurisdiction over the subject matter under the Sherman Act.[36]

---

[35] This warning was reiterated by the Court in *Maryland* v. *Wirtz*, 392 U.S. 183, 196 (1968).

[36] *See, e.g., Wolf* v. *Jane Phillips Episcopal Memorial Medical Center*, 513 F.2d 684 (10th Cir. 1975); *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F.2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Riggall* v. *Washington County Medical Society*, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958); *Robinson* v. *Lull*, 145 F. Supp. 134 (N.D. Ill. 1956); *Marston* v. *Ann Arbor Property Managers (Management) Assn.*, 302 F. Supp. 1276 (E.D. Mich. 1969), *aff'd per curiam*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970); *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d 269 (2nd Cir. 1964); *Hotel Phillips, Inc.* v. *Journeymen Barbers*, 195 F. Supp. 664 (W.D. Mo. 1961), *aff'd*, 301 F.2d 443 (8th Cir. 1962); *Evanston Cab Co.* v. *City of Chicago*, 325 F.2d 907 (7th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964); *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947); *Yellow Cab Co. of Nevada* v. *Cab Emp. Auto. & W. Local #881*, 457 F.2d 1032 (9th Cir. 1972).

After having respondents' memorandum in support of its motion to dismiss for approximately four weeks, petitioner filed a detailed factual amendment to the jurisdiction allegations in its complaint. (App. at 34-38.) Respondents' memorandum had made petitioner fully aware of the jurisdictional defects in the complaint and petitioner set forth in its amended complaint all allegations of interstate commerce that it intended to prove for jurisdictional purposes. Respondents properly challenged these allegations as being legally insufficient, even if they could be proved. There was no need for discovery in order to decide the motion. *See* cases cited in footnote 36, page 51, *supra*. Furthermore, at the hearing before the district court petitioner made clear that the facts alleged in its amended complaint constituted the totality of the purported interstate commerce affected by the conduct complained of.[37]

The transcript of oral argument before the district court is barren of any suggestion by petitioner that it needed discovery. Indeed, petitioner indicated to the district court that it had "set forth in substantial detail the facts" which it believed satisfied the jurisdictional requirements and requested the court to move forward. Petitioner should not now be heard to argue it had insufficient opportunity for discovery.

---

[37] Petitioner stated to the district court:

> We have amended our complaint to set forth in substantial detail the facts which we intend to prove with respect to the involvement of interstate commerce because we felt that we'd like to move forward in this case and get to the merits of it and we would like the Court to have before it as soon as possible the facts that we felt justifies this Court in exercising its jurisdiction to deal with this particular situation, as we see it, this particular anti-competitive situation that we feel violates the Sherman Act.
>
> We have set forth the various facts which we believe satisfy both the tests Mr. Bolze has referred to. (Transcript before the District Court, Civil No. 4048, February 22, 1973, at p. 26.)

CONCLUSION

For all the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

RAY S. BOLZE
JOHN R. FORNACIARI
MARK W. PENNAK
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

THOMAS W. STEED, JR.
ALLEN, STEED & PULLEN
P.O. Box 2058
Raleigh, North Carolina 27602

JOHN H. ANDERSON
SMITH, ANDERSON, BLOUNT & MITCHELL
P.O. Box 750
Raleigh, North Carolina 27602

LILLARD MOUNT
HOFFLER, MOUNT, WHITE & LONG
102 East Main Street
Durham, North Carolina 27701

Attorneys for Respondents

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No. 74-1452

In the Supreme Court of the United States

OCTOBER TERM, 1975

HOSPITAL BUILDING COMPANY, PETITIONER

v.

TRUSTEES OF THE REX HOSPITAL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,

THOMAS E. KAUPER,
Assistant Attorney General,

ROBERT B. REICH,
Assistant to the Solicitor General,

BARRY GROSSMAN,
ROBERT B. NICHOLSON,
JOHN J. POWERS, III,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This memorandum addresses the threshold question whether a conspiracy to block the expansion of a hospital which derives most of its goods and services, revenues and potential sources of borrowed funds from out of state, sufficiently affects commerce to come within the jurisdiction of the Sherman Act. Although this is a private damage action, the United States has a direct interest in the standard for determining the interstate nexus required for jurisdiction under the Act. Moreover, because the federal

government regulates many aspects of the health care industry and contributes substantial funds to hospitals such as petitioner, anticompetitive activity in this sector of the economy could significantly affect existing federal programs.

STATEMENT

1. Petitioner operates for profit a 49-bed proprietary hospital in Raleigh, North Carolina. Respondents, collectively referred to as the Raleigh Group, are a public, non-profit, hospital which is also located in Raleigh, two of its officers and an officer of the Health Planning Council for Central North Carolina (Pet. App. A-3, D-1). In its amended complaint,[1] petitioner alleged that beginning in 1970 and continuing through the present, the Raleigh Group violated Sections 1 and 2 of the Sherman Act by conspiring to prevent it from relocating and expanding its hospital facilities (Pet. App. A-3—A-4); that the Raleigh Group devised a scheme involving bad faith efforts to block authorization of the expansion, tactics to hold up implementation of petitioner's plans once authorization was gained, and malicious instigation of adverse publicity and general public antipathy (Pet. App. A-4); and that the purpose of this alleged conspiracy was to control the number of hospital beds, allocate patients and otherwise illegally restrain competition for medical-surgical hospital services in the Raleigh area (*ibid.*). The amended complaint further alleged that petitioner "is doing business in interstate commerce" and that the alleged conspiracy "has a substantial and direct effect on interstate commerce" (Pet. 7).

[1] The amended complaint was filed after the Raleigh Group moved to dismiss the complaint for lack of subject matter jurisdiction. The amended complaint contains detailed factual allegations concerning the interstate commerce issue.

The factual allegations in the amended complaint concerning interstate commerce are not disputed. Petitioner receives most of its revenue (95 percent in 1972) from insurance companies located in states other than North Carolina and from the federal government through medicare and medicaid programs (Pet. App. A-9, D-2); this amount will increase if the petitioner expands (Pet. App. A-18). Petitioner plans to finance the relocation and expansion of its facilities through loans obtained from one or more lenders located in states other than North Carolina; the estimated cost of this project is $4 million (Pet. App. A-18, D-2—D-3). Petitioner purchases approximately 80 percent of its medicines, goods and supplies from vendors located outside North Carolina (Pet. App. A-17, D-2). In 1972 these purchases totalled $112,846, not including food and kitchen supplies; this amount will also increase if petitioner expands (Pet. App. A-17). Petitioner is a wholly-owned subsidiary of a Delaware corporation having its principal office in Macon, Georgia; petitioner purchases management services from its parent for a fee based upon its gross receipts (Pet. App. A-17—A-18, D-2). In 1972, this fee was approximately $36,000 (Pet. App. A-18).

2. The district court dismissed the amended complaint on the ground that petitioner's involvement with interstate commerce is "incidental to the conduct of its principal business which is that of operating a hospital * * *" (Pet. App. D-3) and that that business "is strictly a local, intra-state business" (*ibid.*).

A divided court of appeals, sitting *en banc* (Pet. App. B-1), affirmed, on the ground that petitioner had failed to show that the alleged anticompetitive activity occurred in interstate commerce or that it had a substantial effect on interstate commerce.[2] As to the latter test, the majority reasoned that there was no showing that "the alleged conspiracy, even if successful, can affect interstate commerce in the detrimental manner that concerned Congress when it passed the Sherman Act" (Pet. App. A-10); that the economic consequences of the alleged conspiracy appeared to be negligible (*ibid.*); that the complaint had not alleged a "real danger, in a practical sense, of anticompetitive conduct to the flow of commerce, or the potential destructive power of a conspiracy" (Pet. App. A-12);[3] and that it did not allege that respond-

[2] A panel of the court of appeals initially had affirmed *per curiam* (Pet. App. C-1—C-2).

[3] The court recognized that this Court had never expressly applied such a test for jurisdiction under the Sherman Act but it concluded that "[s]uch an approach is implicit in the format and choice of words" in *United States* v. *Employing Plasterers Assn.*, 347 U.S. 186, and in *Burke* v. *Ford*, 389 U.S. 320 (Pet. App. A-12).

ents had the market power to drive petitioner out of business (Pet. App. A-13).

Three judges dissented on the ground that the majority's decision was inconsistent with *Gulf Oil Corporation* v. *Copp Paving Company, Inc.*, 419 U.S. 186. There, the dissenters noted, this Court had reaffirmed its previous interpretations of the broad scope of Section 1, and thus, "the question is whether Congress could reach the alleged conduct under the commerce power" (Pet. App. A-16). The dissenters concluded that the facts alleged in the amended complaint were sufficient to withstand a motion to dismiss because they established a substantial effect on interstate commerce.

ARGUMENT

1. Section 1 of the Sherman Act, 15 U.S.C. 1, prohibits every contract, combination or conspiracy "in restraint of trade or commerce among the several States * * *," and Section 2, 15 U.S.C. 2, prohibits monopolizing "any part of the trade or commerce among the several States * * *." Jurisdiction is established under the Act if the restraint occurs in or substantially affects interstate commerce. *Burke* v. *Ford*, 389 U.S. 320, 321. The court of appeals held that for there to be a substantial effect on interstate commerce there must be a "real danger * * * of anticompetitive conduct to the flow of commerce" (Pet. App. A-12), and the restraint must "affect interstate commerce in [a] detrimental manner * * *" (Pet. App. A-10).

Contrary to the court's ruling, a restraint may "substantially affect" interstate commerce without it having a substantial anticompetitive effect on such commerce. Jurisdiction is established if the restraint is imposed upon an activity (either local or interstate) which involves a substantial amount of interstate commerce. Accordingly, the magnitude of the anticompetitive effect upon such commerce is immaterial. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 785.

This Court has repeatedly recognized that in the Sherman Act Congress exercised the full sweep of its power under the Constitution. In *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 435, the Court stated:

> * * * Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed.

In *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533, 558, the Court again concluded that the Congress that enacted the Sherman Act "wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements * * *." In *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 298, the Court said that "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.' *Apex Hosiery Co.* v. *Leader*, 310

U.S. 469, 495." See also *Gulf Oil Corporation* v. *Copp Paving Company, supra; Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495; *United States* v. *American Building Maintenance Industries*, 422 U.S. 271.

Congress has broad power under the Commerce Clause to regulate intrastate activities that have a significant relation to interstate commerce. *Perez* v. *United States*, 402 U.S. 146; *Katzenbach* v. *McClung*, 379 U.S. 294; *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241; *United States* v. *Darby*, 312 U.S. 100; *United States* v. *Wrightwood Dairy Company*, 315 U.S. 110, 125. "[E]ven if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Wickard* v. *Filburn*, 317 U.S. 111, 125.

Accordingly, the Sherman Act applies if the restraint affects a significant amount of interstate commerce, regardless of the competitive impact of the restraint. *Goldfarb* v. *Virginia State Bar, supra*, 421 U.S. at 784-785. In *Goldfarb*, which involved the legality under Section 1 of the Sherman Act of a minimum-fee schedule enforced by a state bar, the Court held that the fee schedule's restraint on legal services had a substantial effect on interstate commerce by virtue of the facts that a significant portion of the funds furnished for purchasing homes in the state came from outside the state and that a

significant amount of real estate loans was guaranteed by the federal government. In response to respondents' argument that there was no substantial effect on interstate commerce since there was no showing that home buyers were discouraged by this restraint or that fees were actually raised, the Court noted that no such showing was necessary, for "[o]therwise, the magnitude of the effect would control, and our cases have shown that, once an effect is shown, no specific magnitude need be proved." *Id.* at 785.[4] Indeed, contrary to the court of appeals' theory, this Court has indicated that the Act may reach unsuccessful restraints upon an activity that substantially affects interstate commerce. *United States* v.

[4] See also *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (agreement to fix price paid for California-grown sugar beets); *United States* v. *Frankfort Distilleries, supra* (agreement to fix local retail liquor prices); *United States* v. *Employing Plasterers Assn.*, 347 U.S. 186 (combination to suppress competition among Chicago plastering contractors); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (local advertising agreements used to injure competitor in interstate competition); *Lehrman* v. *Gulf Oil Corporation*, 464 F.2d 26 (C.A. 5), certiorari denied, 409 U.S. 1077 (single gasoline station's purchases of tires, batteries and accessories substantially affect interstate commerce so as to come within the Act); *Rasmussen* v. *American Dairy Association*, 472 F.2d 517 (C.A. 9), certiorari denied, 412 U.S. 950 (conspiracy to eliminate plaintiff's filled milk drink); *United States* v. *Finis P. Ernest, Inc.*, 509 F.2d 1256 (C.A. 7), certiorari denied *sub nom. Modern Asphalt Paving and Construction Co.* v. *United States*, No. 74-1219, October 6, 1975 (contractor who used approximately $9300 of materials obtained in interstate commerce in performing a contract obtained by means of a rigged bid comes within the Act).

Socony-Vacuum Oil Company, 310 U.S. 150, 224-225, n. 59.[5]

2. The alleged restraint here substantially affects interstate commerce.

According to the amended complaint, most of petitioner's medicines and supplies and all of its management services come from out of state. In 1972 these purchases totaled approximately $150,000. If petitioner expands its hospital, these purchases will increase significantly (Pet. App. A-17—A-18). Moreover, petitioner intends to finance its $4 million expansion through an out-of-state lender. Finally, out-of-state insurance companies and the federal government supply a substantial portion of petitioner's revenue (95 percent in 1972) (Pet. App. A-9, A-18, D-2—D-3).[6]

The amount of interstate commerce here affected by the alleged restraint is similar to that held "substantial" in comparable cases. See, *e.g.*, *Mabee* v.

[5] Contrary to the court of appeals' view, neither *United States* v. *Employing Plasterers Assn.*, 347 U.S. 186, nor *Burke* v. *Ford*, 389 U.S. 320, supports the proposition that there is insufficient involvement with interstate commerce unless the defendant by its restraint exercises substantial "anticompetitive power" (Pet. App. A-13). While the defendants in those cases may have possessed market power, that was not the rationale upon which the Court found jurisdiction under the Act. Rather, in both cases the Court found that the local restraint affected a significant amount of interstate commerce.

[6] The amended complaint also alleges that "[a] substantial number of persons regularly come from states other than North Carolina to the Raleigh area * * * hospitals" and that petitioner "regularly utilizes interstate communications * * * to carry on its business" (Pet. App. D-2).

White Plains Publishing Company, 327 U.S. 178, where the Court applied the Fair Labor Standards Act, a statute in which Congress did not exercise fully its power over commerce, to a newspaper only ½ of 1 percent of whose circulation was out of state; see also *Rasmussen* v. *American Dairy Association*, 472 F. 2d 517, 525-526 (C.A. 9), certiorari denied, 412 U.S. 950 (a conspiracy to eliminate plaintiff's business with yearly profits of only $36,720 substantially affects interstate trade); *Lehrman* v. *Gulf Oil Corporation*, 464 F. 2d 26, 34-35 (C.A. 5), certiorari denied, 409 U.S. 1077 (a single, small gasoline station's purchases of tires, batteries and accessories substantially affect interstate commerce).

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

ROBERT B. REICH,
Assistant to the Solicitor General.

BARRY GROSSMAN,
ROBERT B. NICHOLSON,
JOHN J. POWERS, III,
Attorneys.

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IN THE

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HOSPITAL BUILDING COMPANY,

Petitioner,

vs.

TRUSTEES OF THE REX HOSPITAL, a Corporation; JOSEPH BARNES, GEORGE STOCKBRIDGE, and RICHARD URQUHART, JR.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

MOTION OF FEDERATION OF AMERICAN HOSPITALS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER HOSPITAL BUILDING COMPANY

AND

BRIEF OF FEDERATION OF AMERICAN HOSPITALS AS AMICUS CURIAE IN SUPPORT OF PETITIONER HOSPITAL BUILDING COMPANY.

CARL WEISSBURG
LYLE R. MINK
WEISSBURG AND ARONSON, INC.
1901 Avenue of the Stars, Suite 1400
Los Angeles, California 90067
Attorneys for Amicus Curiae Federation of American Hospitals.

November 19, 1975.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

Supreme Court of the United States

October Term, 1975
No. 74-1452

HOSPITAL BUILDING COMPANY,

Petitioner,

vs.

TRUSTEES OF THE REX HOSPITAL, a Corporation; JOSEPH BARNES, GEORGE STOCKBRIDGE, and RICHARD URQUHART, JR.,

Respondents.

Motion of Federation of American Hospitals for Leave to File Brief as Amicus Curiae in Support of Petitioner Hospital Building Company.

The Federation of American Hospitals (FAH) respectfully moves this Court for leave to file the accompanying brief as amicus curiae in support of petitioner Hospital Building Company (HBC). The consent of the attorneys for HBC has been obtained but the attorneys for respondents have refused to consent to the filing of a brief by FAH—as they did unsuccessfully in the Court of Appeals.

FAH, a non-profit corporation organized and existing under the laws of the State of New York, represents the interests of approximately 1,100 investor-owned acute care hospitals (including Mary Elizabeth Hospital

operated by petitioner HBC) throughout the United States and its possessions[1] by means of direct membership and affiliated state associations. FAH is the recognized spokesman for such hospitals.

FAH and its members have a direct and immediate interest in this case because the overwhelming majority of its members participate as providers of services in the Medicare program and, in addition, a substantial portion of FAH members are located in states which have enacted certificate of need legislation.[2] Therefore, most FAH members will ultimately be affected by this Court's decision.[3]

In this case the Court of Appeals for the Fourth Circuit held that the conduct alleged by petitioner was not within the ambit of section 1 of the Sherman

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[1]In 1974 there were 7,174 hospitals registered with the American Hospital Association. (AMERICAN HOSPITAL ASSOCIATION, HOSPITAL STATISTICS, at 3 (1975).) The overwhelming majority of hospitals in the United States are registered with the AHA.

[2]Generally, certificate of need legislation is designed to prevent duplication of facilities, services and equipment by requiring that each proposed construction or expansion of a health facility be allowed only upon a determination that the proposal meets a legitimate public need. (*E.g.*, Cal. Health & Saf. Code §§ 437 *et seq.*) Since 1966, the year in which Congress authorized the Secretary of Health, Education and Welfare (Secretary) to make grants to states which have adopted (and had approved by the Secretary) state plans for comprehensive health planning (42 U.S.C. § 246), twenty-seven states have enacted such legislation and three more are presently considering it. (Information obtained from the Department of Health Planning and Delivery of the American Hospital Association (as of December 31, 1974).)

[3]If the purpose of certificate of need legislation can be undermined by allowing persons to prevent or delay expansion of facilities after approval has been obtained, especially when such facilities are intimately involved in the flow of interstate commerce, then the adverse impact on the hospital industry, including the members of FAH, will be significant.

Act because it neither occurred in interstate commerce nor substantially affected it. In view of the setting in which today's hospitals operate, FAH believes that the Court of Appeals' decision was unrealistic and, therefore, incorrect.[4] Further, it left undisturbed the decision of the Court of Appeals which will render meaningless existing federal[5] and state certificate of need laws and will result in increased costs of hospital services.[6]

FAH desires to present to this Court certain facts which highlight the artificiality of the decision below and bring into clearer focus the impact of such facts on the issues before this Court. Specifically, such facts describe (a) the involvement of the Medicare program and the participating hospitals (including Mary Elizabeth) in interstate commerce, and (b) the relationship of present day hospital services to the flow of commerce to and from the hospital facility. Such facts have not been—and may not be—presented to this Court by the parties because petitioner has requested FAH to present them and respondents have no reason to do so since such facts serve only to weaken respondents' position.

In addition, FAH desires to present a succinct argument based on such facts, without duplicating any of the arguments made by respective counsel.

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[4]Although the decision also is in conflict with decisions in other circuits, this argument is being made by the parties herein; FAH, therefore, does not intend to duplicate such efforts.

[5]See 42 U.S.C. § 246.

[6]Congress has given additional impact to certificate of need laws by enacting a statute which requires the Secretary of Health, Education and Welfare to exclude from a health facilities' Medicare and Medicaid payments certain sums related to capital expenditures if prior approval for such expenditures was not obtained from a state planning agency. (42 U.S.C. § 1320a-1.)

As noted above, when this case was before the Court of Appeals FAH was allowed to file, over respondents' objection, an amicus curiae brief in support of petitioner. With this matter now before this Court, respondents have again objected to the filing of an amicus curiae brief by FAH. In a case of this magnitude this Court should have, to the greatest extent practicable, the benefit of a full airing of all the facts, issues and arguments involved. Viewed in this light, there is no apparent valid reason for respondents' opposition to the filing of an amicus curiae brief by FAH.

Accordingly, FAH respectfully requests permission to file the accompanying amicus curiae brief containing the items described in this motion.

Respectfully submitted,

CARL WEISSBURG
LYLE R. MINK

WEISSBURG AND ARONSON, INC.
1901 Avenue of the Stars, Suite 1400
Los Angeles, California 90067
Attorneys for Amicus Curiae
Federation of American Hospitals.

November 19, 1975.

IN THE

Supreme Court of the United States

October Term, 1975
No. 74-1452

HOSPITAL BUILDING COMPANY,
Petitioner,

vs.

TRUSTEES OF THE REX HOSPITAL, a Corporation; JOSEPH BARNES, GEORGE STOCKBRIDGE, and RICHARD URQUHART, JR.,
Respondents.

Brief of Federation of American Hospitals as Amicus Curiae in Support of Petitioner Hospital Building Company.

I. INTEREST OF AMICUS CURIAE.

The interest of amicus curiae is set forth in the preceding motion at pages 1-2, *supra.*

II. SUMMARY OF ARGUMENT.

The very existence of the Medicare program depends on the transfer of substantial sums of money between the government, intermediaries, carriers and hospitals located in every state of the Union; the services paid for with such funds are, therefore, an integral part of an interstate transaction. Moreover, given the substantial volume of interstate Medicare transactions, and the inseparability of hospital services from those transactions, a restraint on the provision of such services

sufficiently affects interstate commerce to invoke the provisions of the Sherman Act.

In addition, and apart from participation in the Medicare program, it is generally recognized in today's world that hospitals are intimately involved in interstate commerce. This recognition is manifested not only by federal labor laws and the cases construing them but also by other federal legislation which has an effect on hospital operations and which is based on the power of Congress to regulate commerce among the states.

III. ARGUMENT.

A. Introduction.

In this case the Court of Appeals for the Fourth Circuit held that the conduct alleged to have been engaged in by respondents, even had it occurred,[1] was of a nature which did not act directly upon activity in the flow of interstate commerce ("in commerce" test) and did not restrain activity having a substantial effect on interstate commerce ("affecting commerce" test). (Appendix to Brief of Petitioner (hereinafter "App.") at 57, 61; 511 F.2d at 682, 684.)

The basis for the Court of Appeals' holding on the "in commerce" test appears to be that (a) restraining the hospital services by Mary Elizabeth Hospital ("Mary Elizabeth"), owned by petitioner Hospital Building Company (HBC), and (b) controlling the market for such services in the Raleigh area did not act directly upon the interstate aspects of HBC's business but, rather,

[1]Hereinafter, the reference to such conduct as having been "alleged" will be omitted, recognizing that this case involves the question of whether the district court's dismissal on the pleadings was proper.

affected only the provision of surgical-medical services in the Raleigh area—a local, intrastate activity. (App. at 56-57; 511 F.2d at 682.)

As will appear more fully below, the conclusion reached by the Court of Appeals is unrealistic in view of the health care delivery system which presently exists in the United States. Today, conduct which affects the rendition of hospital services automatically affects the goods, services and activities which make the delivery of those very hospital services possible.

The bases for the Court of Appeals' holding on the "affecting commerce" test appear to be that (a) respondents' conduct did not have a sufficiently substantial effect on interstate commerce to satisfy the "affecting commerce" test (App. at 61; 511 F.2d at 684), (b) the effect of respondents' conduct on HBC was the result of the indirect and fortuitous consequence of the restraint of intrastate hospital services rather than the result of activity purposely directed toward interstate commerce (App. at 60; 511 F.2d at 684), (c) none of the economic consequences resulting from such restraint could have more than a negligible impact on their respective markets (App. at 61; 511 F.2d at 684), and (d) petitioner has made no allegation that respondents have the kind of anticompetitive power at which section 1 of the Sherman Act is aimed (App. at 64; 511 F.2d at 685).

As is further illustrated below, these observations by the Court of Appeals simply are not accurate. Because the operations of Mary Elizabeth, and hospitals like it, result in considerable involvement in interstate commerce, and because the provision of hospital services is inseparable from such interstate involvement, the effect of conduct which restrains the rendition of those

hospital services necessarily has a direct and substantial effect on interstate commerce. (*See Goldfarb v. Virginia State Bar*, ... U.S. ....., 95 S.Ct. 2004, 2012, 44 L.Ed.2d 572, 583-84 (1975).) This relationship is further highlighted by the fact that any noticeable restraint on the flow of goods, services or funds to Mary Elizabeth would seriously impede the delivery of such hospital services.

Finally, the Court of Appeals suggests that respondents do not have the kind of anticompetitive power which Congress sought to guard against. Such an analysis, however, overlooks the intent of the Sherman Act, which is to make unlawful certain kinds of anticompetitive *conduct*, not the threatened or actual *result* of that conduct. The fact that there has been no showing that petitioner was actually put out of business or that respondents had the power to do so, is immaterial. (*See id.*)

B. Operation of the Medicare Program Depends on Interstate Transactions.

1. The "in Commerce" Test.

Petitioner maintains that Mary Elizabeth's participation as a qualified provider of services under the Medicare program has resulted in its intimate involvement in interstate commerce. In order to illustrate the extent to which the Medicare program is involved in interstate commerce, a brief explanation of the mechanics of the program is necessary.

The Social Security Amendments of 1965, as amended, have been codified as 42 U.S.C. §§ 1395-1395pp (hereafter "Medicare Act" or "Act").[2] The Act provides

[2]Hereinafter, all references to sections are to Title 42 of the United States Code unless otherwise indicated.

basically two kinds of health insurance for its beneficiaries. Part A of the Act (§§ 1395c-1395i-2) generally provides insurance for services rendered by hospitals and other institutions (hereinafter sometimes referred to collectively as "providers") which are qualified to participate in the Medicare program. (§§ 1395f, 1395cc.)[3] Payment for services rendered by such providers is based on the reasonable cost of such services, which includes not only the cost of patient care (*e.g.*, drugs, medical supplies, food, nursing services, etc.) but also that portion of the provider's costs related to (a) depreciation on the provider's building and equipment and (b) interest on loans for construction of the building and purchase of the equipment allocable to such patient care. (§§ 1395x(v)(1)(A); 20 C.F.R. §§ 405.401-405.452; 1 CCH Medicare and Medicaid Guide ¶¶ 4590-5999X-15.) Payment is made by the Secretary of Health, Education and Welfare (Secretary) directly to qualified providers, or fiscal intermediaries located throughout the United States

[3]In 1974 there were 7,174 hospitals registered with the American Hospital Association. (AMERICAN HOSPITAL ASSOCIATION, HOSPITAL STATISTICS, at 3 (1975).) The overwhelming majority of hospitals in the United States are registered with the American Hospital Association.

Health Maintenance Organizations (§§ 300e *et seq.*) are also eligible to participate in the Medicare program. (§ 1395 mm.) As of October 1, 1974 there were 177 operational HMOs. (Schneider and Stern, *Health Maintenance Organizations and the Poor: Problems and Prospects*, 70 Nw. U.L. REV. 90, 91 n.2 (1975).) Some of the well-established HMO prototypes are: the Kaiser Foundation health plan in Oakland, California (est. 1942), the Ross-Loos Medical Clinic in Los Angeles (est. 1929), Group Health Association in Washington, D.C. (est. 1937), the Group Health Cooperative of Puget Sound (est. 1947), and the Health Insurance Plan of Greater New York (est. 1947). As of the end of 1972 about 7 million persons were enrolled in such plans. (2 CCH MEDICARE AND MEDICAID GUIDE ¶ 13,945, at 5676.)

nominated by such providers,[4] with monies from the Federal Hospital Insurance Trust Fund (§ 1395i).[5]

[4]The Medicare Act authorizes national, state or other public or private agencies or organizations, commonly known as "fiscal intermediaries" when operating under part A of the Act, to assist in the administration of the program.

Among other things, fiscal intermediaries process Medicare reimbursement claims received from providers by determining the amount of payment due to the providers on such claims for Medicare services and paying providers on such claims, consult with providers regarding the maintenance of their fiscal records, audit the records of such providers and serve as a channel of communication between the providers and the Secretary. (§ 1395h(a).) These fiscal intermediaries are usually private organizations such as health and accident insurance companies and the Blue Cross Association (which subcontracts with approximately 73 different Blue Cross plans throughout the United States). As of March 1974 intermediaries for part A of the Act and the states in which they serviced providers were: *Aetna Life and Casualty*—Alabama, Arizona, Arkansas, California, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Virginia, Washington, and Wisconsin; *Blue Cross Association* (through 73 Blue Cross plans)—All States (including the District of Columbia and Puerto Rico) with the exception of Hawaii and Nevada; *Cooperativa de Seguros de Vida de Puerto Rico*—Puerto Rico and Virgin Islands; *Hawaii Medical Service Association*—Hawaii, American Samoa, and Guam; *Inter-County Hospitalization Plan, Inc.*—Pennsylvania; *Kaiser Foundation Health Plan, Inc.*—California, Hawaii, Ohio, Oregon, and Guam; *Mutual of Omaha Insurance Co.*—Alabama, California, Colorado, District of Columbia, Florida, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Oklahoma, Oregon, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin; *Nationwide Mutual Insurance Co.*—Kentucky and Ohio; *Prudential Insurance Co. of America*—New Jersey; *Travelers Insurance Co.*—California, Connecticut, Florida, Georgia, Illinois, Indiana, Maine, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Mexico, New York, Pennsylvania, Rhode Island, Vermont, and Wisconsin. (2 CCH MEDICARE AND MEDICAID GUIDE ¶ 13,310, at 5357.) During fiscal year 1973 intermediaries processed almost 20 million part A bills. (Communication from Secretary of Health, Education and Welfare, Seventh Annual Report on Medicare Covering Fiscal Year 1973, at 1 (1975) [hereinafter "Annual Report"].)

[5]The Federal Hospital Insurance Trust is made up of compulsory wage taxes paid by employers, employees and

If a provider nominates a fiscal intermediary to assist it in its dealings with the Secretary, the provider's bills are submitted directly to the intermediary for payment. (§ 1395h(a).) Although a provider may choose to deal directly with the Secretary rather than through a fiscal intermediary (§ 1395h(a); *see also* 20 C.F.R. § 405.651(a)), all but a small percentage of providers have elected to deal with the Secretary through such intermediaries.[6]

The method of transferring funds from the Trust Fund to the fiscal intermediary, with slight variations in each case,[7] is generally by letter of credit. (*See* 31 C.F.R. § 205.5; Social Security Administration, U.S. Dept. of Health, Education and Welfare, Part A, Intermediary Manual—Part 1, Fiscal Administration (HIM 13-1) ¶¶ 1408-1410.) The managing trustee of the Trust Fund is required to pay to the Secretary such amounts as the Secretary certifies are necessary for the payments required under the Medicare program. (§ 1395i(h).) Letters of credit issued to intermediaries are first sent by the Social Security Administration to the Treasury Department for verification. Once veri-

self-employers under the Federal Insurance Contributions Act (FICA) and the Self-Employment Contributions Act. (*See* 26 U.S.C. §§ 1401(b), 3101(b), 3111(b).)

[6]About 1.5 percent of the national part A claims are submitted directly by providers. (Annual Report, *supra* note 4, at 12.) As of June 30, 1973 the Blue Cross Association (with subcontracts to 73 Blue Cross Plans), five commercial health insurers, and four independent insurers were operating as fiscal intermediaries on behalf of over 13,000 participating providers and 2,900 independent laboratories. Approximately 6,757 of those 13,000 providers are hospitals. (Note 12, *infra*.) There were 187 hospitals, 86 skilled nursing facilities, 257 home health agencies and three rehabilitation agencies submitting bills directly to the Social Security Administration. (Annual Report, *supra* note 4, at 12.)

[7]The precise method of transferring such funds and the manner of payment varies due to the difference in agreements between the Secretary and each intermediary.

fied, the letter of credit is sent to the branch of the Federal Reserve Bank in the district in which the intermediary is located. The intermediary then draws a payment voucher which results in the transfer to its account of the funds authorized by the letter of credit.[8] The intermediary makes payments to participating providers by drawing checks on its account.

Part B of the Act (§§ 1395j-1395w) is a voluntary health insurance program which provides coverage for supplementary medical services such as physicians' care, outpatient physical therapy, ambulance and home health services. (§§ 1395k, 1395x(s).) Persons eligible for these benefits must make monthly payments established by the Secretary (§ 1395r(b) and (c)); these premiums together with contributions from the federal government are placed into the Federal Supplementary Medical Insurance Trust Fund (§ 1395t) to pay for the benefits under part B. (§§ 1395*l*(a), 1395t(g).)

Generally, a person enrolled under part B may either pay for covered services and request reimbursement (§ 1395u(b)(3)(B)(i)) of 80% of the reasonable charge (§ 1395*l*(a)) or assign the right to reimbursement to the person providing the service, who can collect as an assignee (§ 1395u(b)(3)(B)(ii)).

As in part A, intermediaries are authorized to assist in the administration of part B, however under part

[8]The specific procedures to be followed with respect to such letters of credit are promulgated by the Commissioner of the Bureau of Government Financial Operations in the Treasury Fiscal Requirements Manual for Guidance of Departments and Agencies. (31 C.F.R. § 205.10.)

B they are referred to as "carriers". (§ 1395u.) Part B is administered largely through such carriers,[9] locat-

[9]One of the reasons that, to the extent possible, physicians are required to be paid through carriers stems from the fact that private insurers, group health plans and voluntary medical insurance plans have more experience in reimbursing physicians for reasonable charges for their services. As of June 30, 1973 there were 33 Blue Shield plans, 13 insurance companies, one independent health insurer and one State agency operating as carriers. (Annual Report, *supra* note 4, at 91.) They were as follows: *Alabama*—Blue Cross-Blue Shield of Alabama; *Alaska*—Aetna Life & Casualty; *Arizona*—Aetna Life & Casualty; *Arkansas*—Arkansas Blue Cross and Blue Shield; *California*—Counties of Los Angeles, Orange, San Diego, Ventura, San Bernardino, Imperial, San Luis Obispo, Riverside, Santa Barbara: Occidental Life Insurance Co. of California; Rest of State, Blue Shield of California; *Colorado*—Colorado Medical Service, Inc.; *Connecticut*—Connecticut General Life Insurance Co.; *Delaware*—Blue Cross and Blue Shield of Delaware; *District of Columbia*—Medical Service of D.C.; *Florida*—Counties of Dade and Monroe: Group Health Incorporated; Rest of State, Blue Shield of Florida, Inc.; *Georgia*—The Prudential Insurance Co. of America; *Hawaii*—Aetna Life & Casualty; *Idaho*—The Equitable Life Assurance Society; *Illinois*—Cook County: Illinois Medical Service; Rest of State, CNA Insurance; *Indiana*—Mutual Medical Insurance, Inc.; *Iowa*—Iowa Medical Service; *Kansas*—Counties of Johnson, Wyandotte: Blue Shield of Kansas City; Rest of State, Kansas Physicians Service; *Kentucky*—Metropolitan Life Insurance Co.; *Louisiana*—Pan-American Life Insurance Co.; *Maine*—Union Mutual Life Insurance Co.; *Maryland*—Counties of Montgomery, Prince Georges: Medical Service of D.C.; Rest of State, Maryland Blue Shield, Inc.; *Massachusetts*—Blue Shield of Massachusetts, Inc.; *Michigan*—Blue Shield of Michigan; *Minnesota*—Counties of Anoka, Dakota, Filmore, Goodhue, Hennepin, Houston, Olmstead, Ramsey, Wabasha, Washington, Winona: The Travelers Insurance Co.; Rest of State, Blue Shield of Minnesota; *Mississippi*—The Travelers Insurance Co.; *Missouri*—Counties of Andrew, Atchison, Bates, Benton, Buchanan, Caldwell, Carroll, Cass, Clay, Clinton, Daviess, DeKalb, Gentry, Grundy, Harrison, Henry, Holt, Jackson, Johnson, Lafayette, Livingston, Mercer, Nodaway, Pettis, Platte, Ray, St. Clair, Saline, Vernon, Worth: Blue Shield of Kansas City; Rest of State, General American Life Insurance Co.; *Montana*—Montana Physicians Service; *Nebraska*—Mutual of Omaha Insurance Co.; *Nevada*—Aetna Life & Casualty; *New Hampshire*—New Hampshire-Vermont Physician Service; *New Jersey*—The Prudential Insurance Co. of America; *New Mexico*—The Equitable Life Assurance Society; *New York*—Counties of

(This footnote is continued on next page)

ed throughout the United States, whose functions are similar to those performed by part A intermediaries.[10]

Bronx, Columbia, Delaware, Dutchess, Greene, Kings, Nassau, New York, Orange, Putnam, Richmond, Rockland, Suffolk, Sullivan, Ulster, Westchester: Blue Cross-Blue Shield of Greater New York; County of Queens: Group Health, Inc.; Counties of Livingston, Monroe, Ontario, Seneca, Wayne, Yates: Genesee Valley Medical Care, Inc.; Counties of Allegany, Cattaraugus, Erie, Genesee, Niagara, Orleans, Wyoming: Blue Shield of Western New York, Inc.; Counties of Albany, Broome, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Cortland, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, Schuyler, Steuben, St. Lawrence, Tioga, Tompkins, Warren, Washington: Metropolitan Life Insurance Co.; *North Carolina*—The Prudential Insurance Co. of America; *North Dakota*—Blue Shield of North Dakota; *Ohio*—Nationwide Mutual Insurance Co.; *Oklahoma*—Aetna Life & Casualty. Department of Institutions, Social and Rehabilitative Services; *Oregon*—Aetna Life & Casualty; *Pennsylvania*—Pennsylvania Blue Shield; *Rhode Island*—Blue Shield of Rhode Island; *South Carolina*—Blue Shield of South Carolina; *South Dakota*—South Dakota Medical Service, Inc.; *Tennessee*—The Equitable Life Assurance Society; *Texas*—Group Medical and Surgical Service; *Utah*—Blue Shield of Utah; *Vermont*—New Hampshire-Vermont Physician Service; *Virginia*—Counties of Arlington, Fairfax, City of Alexandria: Medical Service of D.C.; Rest of State, The Travelers Insurance Co.; *Washington*—Washington Physicians' Service; *West Virginia*—Nationwide Mutual Insurance Co.; *Wisconsin*—County of Milwaukee: Surgical Care-Blue Shield; Rest of State, Wisconsin Physicians Service; *Wyoming*—The Equitable Life Assurance Society; *Puerto Rico*—Seguros de Servicio de Salud de Puerto Rico; *Virgin Islands*—Seguros de Servicio de Salud de Puerto Rico; *American Samoa*—Hawaii Medical Service Assn.; *Guam*—Aetna Life & Casualty. (2 CCH MEDICARE AND MEDICAID GUIDE ¶ 13,320, at 5373.) During fiscal year 1973 carriers processed over 58 million claims for physicians' and other medical services. (Annual Report, *supra* note 4, at 1.)

[10]A brief description of the functions of part A intermediaries appears in note 4, *supra*. Carriers may also be required to determine compliance with utilization review requirements (§ 1320c *et seq.*), to assist providers in the development of procedures relating to utilization practices and to initiate or assist with other utilization review activities.

In addition, the manner of transferring funds to carriers is substantially the same as the method used with part A intermediaries.[11]

In view of the foregoing, it is apparent that the very existence of the Medicare program depends on an interstate transfer of funds which begins at the United States Treasury and ends after numerous transactions involving fiscal intermediaries, carriers, providers and beneficiaries located in every state of the Union.[12] During the 1974 fiscal year, over $11 billion was the subject of such transfers.[13]

It is also evident that the close economic relationships between out-of-state businesses and the hospitals with whom they deal on a frequent basis make it unrealistic to label the rendition of hospital services as a purely local activity. Rather, such interstate business transactions are an integral part of the services provided by such hospitals.

[11]As with part A intermediaries, the manner of payment varies with each contract, but the basic policy of the Secretary of the Treasury, as set forth in 31 C.F.R. § 205.5, is generally followed. (*See* Social Security Administration, U.S. Dept. of Health, Education and Welfare, Part B, Intermediary Manual—Part 1, Fiscal Administration (HIM 14-1) ¶¶ 4408-4410.) In addition, each contract must provide for advances of funds to the carrier for the purpose of making payments by it under the supplementary medical insurance program.

[12]The number of fiscal intermediaries and carriers participating in the program as of June 1973 are set forth in notes 4 and 9, respectively, *supra*. At the close of the 1973 fiscal year, there were 6,757 hospitals and over 20 million beneficiaries participating in the Medicare program. (Annual Report, *supra* note 4, at 45.)

[13]Worthington, *National Health Expenditures, 1929-74, U.S. Dept. of Health, Education, and Welfare*, 38 SOC. SEC. BULL. 7 (No. 2, Feb. 1974). It is estimated that in 1974 public and private health expenditures constituted approximately 7.7% of the gross national product. (*Id.* at 5.)

For example, a substantial portion of the funds received by petitioner come from the federal government, albeit paid by fiscal intermediaries and carriers. Upon the completion of the petitioner's proposed expansion, a considerable amount of these funds would have been transferred to out-of-state suppliers of items required for direct patient care (*e.g.*, drugs, food, etc.), out-of-state construction lenders,[14] vendors of hospital supplies and equipment,[15] and an out-of-state management company.[16] Since these elements of financing and supply are the interstate aspects of the provision of hospital services and such services depend on, and are inseparable from, such interstate activity (*see Goldfarb v. Virginia State Bar*, ... U.S. ...., 95 S.Ct. 2004, 2012, 44 L.Ed.2d 572, 583 (1975)), the provision of such hospital services is an essential part of an interstate transaction.[17]

[14]Petitioner alleged that the cost of its expansion would have exceeded $4 million which would have been financed by one or more loans with one or more lenders located outside North Carolina. In 1974, the construction costs of all hospitals registered with the American Hospital Association totaled over $3.8 billion. (AMERICAN HOSPITAL ASSOCIATION, CONSTRUCTION REPORT ON HOSPITALS (Vol. 19, No. 9. Sept. 1975).)

[15]Petitioner alleged that in 1972, excluding food and supplies for its kitchen, 80% of the $112,846.00 it spent for supplies for its radiology, medical laboratory and electrocardiology operations and its pharmacy were purchased from out-of-state vendors.

[16]Charter Medical Corporation, which has its principal office in Macon, Georgia, manages Mary Elizabeth for HBC. In 1972, HBC paid Charter $36,000.00 for its management services. As of July 1975 there were at least 32 hospital management companies in the United States which owned or operated approximately 480 hospitals located in states other than the one in which the management company was located. (FEDERATION OF AMERICAN HOSPITALS, DIRECTORY OF INVESTOR-OWNED HOSPITALS AND HOSPITAL MANAGEMENT COMPANIES, at 47-68 (1975).)

[17]Indeed, these interstate aspects of petitioner's business make the very provision of hospital services possible.

Relying on *Rasmussen v. American Dairy Association*, 472 F.2d 517 (9th Cir.), *cert. denied*, 412 U.S. 950 (1973), petitioner argued in the Court of Appeals that it had satisfied the "in commerce" test because respondents' conduct acted directly upon the flow of interstate commerce. The Court of Appeals rejected this argument, stating that this case was distinguishable from *Rasmussen* (where all but one of the ingredients used to manufacture the product which was the subject of the alleged restraint were manufactured out-of-state)[18] because in this case there was "no out-of-state product that was passed to patients in an economic transaction as a dominant ingredient of hospital services in the Raleigh area." (App. at 58; 511 F.2d at 683.) It is submitted that the Court's distinction is illusory and misleading.

Here, as in *Rasmussen*, there are a number of "ingredients" which originate out-of-state and which are used to "manufacture" or make available a "product" in the form of hospital services. Contrary to the view of the Court of Appeals, the dominant ingredients of hospital services in Raleigh originate from out-of-state.

In addition, it is inaccurate to say, as did the Court of Appeals, that the only out-of-state product sold by Mary Elizabeth is drugs. As set forth above, there are many out-of-state goods and services used by Mary Elizabeth, all of which comprise the component parts of the hospital services provided by it.[19]

[18]In *Rasmussen*, the Court held that the restraint on the intrastate sale of a filled-milk product acted directly upon the flow of interstate commerce because all but one of the ingredients from which the filled-milk product was manufactured were supplied from out of the state.

[19]It is interesting to note that the Court of Appeals concedes that drugs are an inseparable component of the

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Finally, the Court of Appeals, relying on *Northern California Pharmaceutical Ass'n v. United States,* 306 F.2d 379, 386-87 (9th Cir.), *cert. denied,* 371 U.S. 862 (1962), stated that because the items flowing from out-of-state to Mary Elizabeth lose their character as both a product and a distinct line of commerce, the hospital services rendered by it were not part of interstate commerce. The Court's reliance is misplaced, not only because *Northern California* contains no requirement that out-of-state goods and services maintain their character as a product or as a distinct line of commerce, but also because the questions before the Court in *Northern California* simply are not analogous here.

In *Northern California* a pharmaceutical association and one of its members were convicted of violating section 1 of the Sherman Act for entering into an agreement to fix the price of precompounded prescription drugs shipped into California from outside the state. One of the contentions on appeal was that even though the drugs started out in the flow of interstate commerce, they were taken out of the flow before they reached consumers by being placed on the pharmacies' storage shelves. In observing that " 'commerce among the states was not a technical legal conception, but a practical one, drawn from the course of business' " (306 F.2d at 387), the court stated that there was a "practical continuity of movement" and the flow of commerce, therefore, did not stop at the pharmacies' storage shelves.

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services provided by Mary Elizabeth yet was not willing to concede that any of the other goods or services played the same role. (Appendix to Brief of Petitioner, at 58; 511 F.2d at 683.)

Thus, in *Northern California* it was uncontested that the drugs were part of the flow of commerce; the only question in the context of foregoing discussion by the Court of Appeals was whether such flow had stopped at the pharmacies' storage shelves. Here, the question in the first instance is whether the hospital services are a part of interstate commerce.

Accordingly, because petitioner's hospital services are in the flow of interstate commerce, the "in commerce" test clearly has been met.

2. The "Affecting Commerce" Test.

In applying the "affecting commerce" test the Court of Appeals concluded that the economic consequences of respondents' conduct would have no more than a negligible impact on interstate commerce. Unfortunately, none of the cases on which the Court relies gives any real support for its conclusion. In addition, the Court's dissatisfaction with the application of the test's standards was apparent:

> "Labeling one case 'de minimis' and another as 'affecting commerce' does achieve a result but is not otherwise very revealing. Anyone who studies decisions applying the 'affecting commerce' test will be struck by the absence of a clear line, much less a bright one, between those effects that are deemed substantial and those that are characterized as 'indirect,' or 'fortuitous,' or 'insubstantial,' or 'de minimis,' or 'sporadic,' or 'incidental.' In any area so very gray it is absurd to suppose that we or any other court can precisely count up the tons of plaster, bottles of liquor, or quantity of proprietary drugs sufficient to cross the line of substantiality. Increasingly, intrastate

economic conduct affects interstate commerce due to the interdependence of all segments of our national economy. Whether or not 'de minimis' has ever been an effective litmus for application of the Sherman Act, we doubt that it now is, and we are concerned that conventional impact analysis may sometimes conceal rather than reveal the true rationale of the decision." (App. at 62; 511 F.2d at 685.)

In addition, the Court of Appeals suggested that the difference between this case and *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3d Cir. 1973) "may be not so much the quantitative difference in effect on interstate commerce as the dramatic difference in anticompetitive *power*." (App. at 64; 511 F.2d at 686; emphasis in original.) However, HBC should not be required to show that respondents had the anticompetitive power to put it out of business, since such an analysis focuses on the degree of impact, or result, of such anticompetitive conduct rather than the conduct itself (*see Goldfarb v. Virginia State Bar*, ... U.S. ....., 95 S.Ct. 2004, 2012, 44 L.Ed.2d 572, 583-84), which is the real danger Congress sought to guard against. As this Court recently stated in *Goldfarb:*

> "The fact that there was no showing that homebuyers were discouraged by the challenged activities does not mean that interstate commerce was not affected. Otherwise, the magnitude of the effect would control and our cases have shown that, once an effect is shown, no specific magnitude need be proved." (.... U.S. ...., 95 S.Ct. 2004, 2012, 44 L.Ed.2d 572, 583-84.)

It is therefore apparent from the foregoing analysis that petitioner also has satisfied the "affecting commerce" test; by restraining the expansion of hospital services which are an integral part of interstate commerce, respondents' conduct necessarily had a direct effect on interstate commerce.[20] (*See Goldfarb v. Virginia State Bar, supra,* ..... U.S. ....., 95 S.Ct. 2004, 2012, 44 L.Ed.2d 572, 583.)

C. Hospitals Are Now Recognized as Having Substantial Involvement in Interstate Commerce.

Wholly apart from their involvement in the Medicar. program, it is generally recognized that modern hospitals play an important part in commercial intercourse among the states. Examples of such recognition appear in the form of recent amendments to the National Labor Relations Act (29 U.S.C. §§ 151 *et seq.*) and other pieces of comprehensive legislation which affect hospitals throughout the United States.

1. The National Labor Relations Act.

It is well settled that enactment of the National Labor Relations Act of 1935 (NLRA) was within the power of Congress to regulate commerce among the states. (29 U.S.C. § 151; *National Labor Relations Board v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 225-226, 83 S.Ct. 312, 313, 9 L.Ed.2d 279, 280-81 (1963); *Polish National Alliance, Etc. v. National Labor Relations Board*, 322 U.S. 643, 647, 64 S.Ct. 1196, 1198, 88 L.Ed. 1509, 1514 (1944); *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30-31, 57 S.Ct. 615, 621, 81 L.Ed. 893,

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[20]It should also be noted that hospitals treat persons who themselves cross state lines.

907-08 (1937).) The National Labor Relations Board (NLRB), therefore, has the jurisdiction to mediate labor disputes affecting interstate commerce. (29 U.S.C. § 160(a).)

Prior to 1974 it was generally recognized that the NLRB had jurisdiction over investor-owned hospitals and investor-owned and non-profit nursing homes because of the impact of their operations on interstate commerce. In *Butte Medical Properties,* 168 N.L.R.B. 266 (1967), for example, the NLRB was required to decide whether it could properly assert jurisdiction over an investor-owned hospital which met the Board's standard of gross revenues required for the exercise of such jurisdiction, the employer arguing that the hospital had an insufficient impact on commerce to warrant the assertion of such jurisdiction. After a comprehensive analysis of all facets of the operations of the hospital in question (*e.g.*, use of out-of-state labor, various kind of supplies, equipment, insurance, utilities and participation in the Medicare and Medicaid programs), and the hospital industry in general,[21] the

[21]The Board's analysis was, in pertinent part, as follows:

"There is no dispute that while all hospitals are primarily humanitarian facilities, some aspects of their operations are essentially business in character. Operationally they are a multibillion dollar complex and, as such, comprise one of the largest industries in the United States. An effective part of this complex is composed of the approximately 970 proprietary hospitals which, as the record shows, influence and affect commerce beyond their immediate individual confines. While it is generally true, as the Employer and its proponents argue, that hospitals such as the Employer's are 'local' in that most of their medical staffs and patients come from nearby communities, that is not true with regard to difficult-to-secure personnel such as registered nurses, dieticians, and therapists. They often must be recruited from other areas. Nor are they local in the character of their operations since the present size and projected future growth of these hospitals indicate that their impact on commerce is already substantial and, in all likelihood, will become more so in the future. The facts show that despite a decrease in the number of proprietary hospitals in the last 20 years, these facilities are presently located in 44 States and, in fact, are an increasing part of the hospital industry in that, with fewer such hospitals, there has been a substantial increase in the number of beds, admissions, census, personnel, payroll, assets, and gross revenues which, in 1965, exceeded $551,000,000.

"The operations of these facilities, moreover, necessarily include substantial purchases of food, beverages, china, silverware, linens, furniture, drugs, medication, supplies and equipment, utility services such as heat, light, and power, as well as various types of insurance. While the purchases made by a particular proprietary hospital may not directly involve interstate commerce, the aggregate purchases of all such facilities clearly have a substantial impact on the operations of the various supplying industries and involve substantial shipments of goods and supplies in interstate commerce. The Employer's operation alone, for example, discloses yearly out-of-state purchases in excess of $30,000.

"Apart from the impact on commerce occasioned by the purchases of supplies and materials, there is also the financial interstate impact of billions of consumer dollars expended by millions of Americans for health protection and care, which dollars travel to and from national insurance companies and the Federal Government which, in turn, make payments directly or indirectly to proprietary and other hospitals. The extent of national participation in health insurance benefits is indicated by a Department of Health, Education, and Welfare report showing that as of December 31, 1964, 79.2 percent of the United States civilian population were enrolled for health care benefits by private health insurance companies, viz., 62,429,000 in Blue Cross and Blue Shield, 104,230,000 in various insurance companies, and 6,960,000 in independent programs. An indication of the amounts received by proprietary hospitals for such health care is shown by the Employer's operation which obtained fifty percent of its $1,100,000 gross revenue from various national health insurance agencies.

"Moreover, the material effect on commerce resulting from the nationwide individual expenditures for health care in which proprietary hospitals participate is further multiplied and augmented by the numerous public health

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Board concluded that the hospital did have a sufficient

impact on interstate commerce to warrant the assertion of its jurisdiction.[22]

On the same day the Board decided *Butte*, it ruled in *University Nursing Home, Inc.*, 168 N.L.R.B. 263 (1967), that the operations of an investor-owned nursing home had a similar impact on interstate commerce.

Similarly, in 1970 the Board concluded in *Drexel Home, Inc.*, 182 N.L.R.B. 1045 (1970), that the opera-

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and welfare enactments of Congress which are financed by the expenditure of public funds in which these facilities also participate, directly or indirectly. These concepts are manifest in the national Medicare program, which has a first year operating budget in excess of $2 billion and which provides for the payment of medical and hospital services to proprietary hospitals, including the Employer, as well as others, for the benefit of a large segment of our population. All of the foregoing unquestionably evinces a substantial national interest in, and a vital concern for, public health and welfare which, if affected by unregulated labor disputes in proprietary hospitals, would exert or tend to exert a wholly undesirable impact not only on the suppliers of these institutions, but also on the public, and, inevitably, on interstate commerce. We believe that these numerous private and public health care efforts *have a very substantial effect on interstate commerce* and that the public interest would be served by making available the orderly and peaceful procedures of this Act in the hospital industry. Indeed, concomitant with these particular efforts is the recognition in Sections 1(b), 201(a), and 206 of the National Labor Relations Act itself that the Act's policy of engendering stable industrial relations is based on advancing the health, safety, and general welfare of the Nation. *Therefore, in view of the substantial interstate and national impact on commerce which is exerted by the Employer and by proprietary hospitals generally, it is apparent that these institutions are not insulated local enterprises.*" (Emphasis added; footnotes omitted.)

[22]The Board's jurisdiction to mediate disputes concerning wages, hours and working conditions in the hospital industry is not insubstantial. In 1974 over 2.9 million persons were employed in the 7,174 hospitals registered with the American Hospital Association. The total payroll for such hospitals was over $23.8 billion. (AMERICAN HOSPITAL ASSOCIATION, HOSPITAL STATISTICS, at 3 (1975).)

tions of a non-profit home for the aged substantially affected interstate commerce.

Because *Butte, University* and *Drexel* were decided when the number of hospitals and nursing homes in the United States was substantially less than it is today, and at a time when the Medicare and Medicaid programs were relatively new, the rationale of these cases applies *a fortiori* to the instant interstate commerce analysis.

The courts have also recognized the impact of health care institutions on interstate commerce, some citing *Butte*, and some not. (*E.g., Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48, 52 (3d Cir. 1973); *Glen Manor Home for Jewish Aged v. N.L.R.B.*, 474 F.2d 1145, 1148 (6th Cir.), *cert. denied*, 414 U.S. 826 (1973); *Council 19, American Fed. of State, Co. & Mun. Emp. v. N.L.R.B.*, 296 F.Supp. 1100, 1104 n. 4 (N.D. Ill. 1968).)

In 1974, recognizing the validity of these and other decisions by the NLRB and the courts, Congress amended § 183 of the NLRA to give express statutory recognition of the Board's jurisdiction to mediate labor disputes affecting *all* health care institutions (defined by § 152(14) as, among other things, any hospital, health maintenance organization or other institution devoted to the care of sick or infirm persons). It is therefore apparent that Congress considers hospitals and other types of health care institutions as being involved in interstate commerce to a degree sufficient to invoke its power under the commerce clause.

Since the ambit of the Sherman Act is at least as extensive as the NLRA, because the power to enact each is found in the commerce clause (*see Burke v. Ford*, 377 F.2d 901, 904 (10th Cir.) *rev'd on other grounds*, 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed. 2d 554 (1967)), then hospitals should be considered as having a sufficient impact on interstate commerce under both Acts.

2. Comprehensive Legislation Affecting Hospital Operations.

Congress has enacted numerous pieces of legislation which regulate, in varying degrees, the operations of Mary Elizabeth and every other hospital in the United States. (*E.g.*, Occupational Safety and Health Act (29 U.S.C. §§ 651 *et seq.*); the Hazardous Substance Act (15 U.S.C. §§ 1261 *et seq.*); the Federal Food, Drug and Cosmetic Act (21 U.S.C. §§ 301 *et seq.*); the Drug Abuse Prevention and Control Act (21 U.S.C. §§ 841 *et seq.*).) The basis for enacting these laws was Congress' power to regulate commerce among the states. (*E.g.*, Occupational Safety and Health Act (29 U.S.C. § 651); Hazardous Substances Act (15 U.S.C. § 1263); Federal Food, Drug and Cosmetic Act (*United States v. Walsh*, 331 U.S. 432, 67 S.Ct. 1283, 91 L.Ed. 1585 (1947)); Drug Abuse Prevention and Control Act (21 U.S.C. § 801).) The fact that such hospital operations have come within the grasp of laws which find their genesis in the commerce clause lends further support to the proposition that modern day hospitals which deliver health care services are engaged in interstate commerce.

IV. CONCLUSION.

The delivery of hospital services by Mary Elizabeth, and the overwhelming majority of hospitals in the United States, is an integral part of an interstate transaction; moreover, a restraint on the provision of such services affects interstate commerce to a degree sufficient to invoke the provisions of section 1 of the Sherman Act.

The decision below should be reversed and the cause remanded for a trial on the merits.

Respectfully submitted,

CARL WEISSBURG
LYLE R. MINK
WEISSBURG AND ARONSON, INC.
1901 Avenue of the Stars, Suite 1400
Los Angeles, California 90067
Attorneys for Amicus Curiae
Federation of American Hospitals.